SEVEN ABSOLUTE RIGHTS

Recovering the Historical Foundations of Canada's Rule of Law

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Seven Absolute Rights is dedicated to the memory of the late Lord Chief Justice of England and Wales Thomas Bingham and the late Chief Justice of Canada Antonio Lamer; without their peerless judicial and scholarly work on the subject of the rule of law, this book would not have been possible.

Exegerunt monumenta aere perennius.

Contents

Preface

In moments of crisis, we rediscover both the importance and the complexity of the rule of law; when governments begin to violate constitutional norms at such a fundamental level that it is difficult to point out exactly how this offends against the letter of the law, the concept becomes indispensable – yet it remains vexing. An individual nation's constitution may or may not contain explicit requirements that its government be bound by the laws or that it abide with the orders of the judiciary to stop engaging in conduct that violates the constitution; whether these requirements are made explicit or remain unstated, it is impossible to imagine constitutional governance without such basic obligations. When rights that were formerly thought so fundamental as to become effectively invisible are in jeopardy, the role of the constitutional historian is, as I take it, to recover the meaning, importance, and scope of these principles from the legal and political context of the time in which the explicit texts – which we ordinarily rely upon exclusively – were written. This is not an easy task.

The rules of chess do not specifically forbid ending the game by knocking over the board. Similarly, constitutions rarely forbid every possible means of making the government unaccountable to the laws. The Constitution of the United States does not specify that a president cannot pardon his coconspirators in order to avoid being prosecuted. When presidents merely threatened to take these actions, they took that nation to the brink of constitutional crisis and brought questions about the rule of law into everyday public conversation. No such constitutional crisis has flagged similar concerns in Canada during the twentieth century, although it increasingly appears that this is overdue.

To speak of the rule of law, then, is to search for principles that underlie a nation's law and is, therefore, to acknowledge the principle no written constitution can be entirely self-contained, whether in the United States or here in Canada. As this book is aimed at correcting the misconception that all our constitutional

rights can be found in the Canadian Charter of Rights and Freedoms, it is pertinent to consider the preamble to the Charter, an introductory statement to that documents that states (in full): "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." The quasi-divine status accorded to the rule of law in this official creation myth of the Canadian state gives us an idea of the importance of this concept. Crucially, the Charter's intimation that Canada's rule of law is older than its constitution is the first indication that the rule of law in this country does not merely serve to prevent the government from circumventing the rules that constrain its authority. As this volume will demonstrate, ascribing that function to it would reduce Canada's rule of law to one that is merely formal, insofar as it would allow the government to do whatever it wishes, as long as it complies with the letter of the law – including new laws passed during emergencies – when doing so. Rather, as I will argue throughout this volume, the rule of law also limits what the government can do, even in the most dangerous emergency. Both of these functions are important in times of crisis, as the recent history of the United States demonstrates, and as our own recent history of controversial emergency powers and antiterrorism legislation also illustrates, if perhaps not quite so vividly.

My last book (*Permanent State of Emergency*, 2017) demonstrated that the United States can no longer be considered a rule of law state, as its executive now has the power to violate nonderogable rights with impunity. The concepts that form that standard demonstrate in the abstract what the rule of law is, while the history that I drew upon to demonstrate that this standard was no longer being met illustrates the importance of the rule of law. The first concept is nonderogability. Certain rights are recognized by international law as so important that governments cannot invoke an emergency as a basis for violating them, even if that emergency threatens to destroy the nation. Nazi Germany could not invoke the danger to its national integrity posed by the total war waged by the Allied powers as justification for its crimes against humanity: as every civilized nation recognized that these rights were nonderogable, the Nuremberg Laws could not justify these violations. The second concept is accountability to the laws, sometimes expressed as *government under law*, or a *government of laws and not men*. These formulations express the purpose of constitutional government,

namely to ensure that no government official becomes so powerful as to be able to break the laws without fear of punishment.

In support of my argument in *Permanent State of Emergency*, I detailed how, in the sixteen years after the 9/11 attacks, the United States gradually abandoned its constitutional order. By 2017, America's legal order included unreviewable executive power to authorize indefinite military detention and extrajudicial killing, even of its own citizens and within the United States. The fact that its president had yet to use those powers was considerably less comforting after it became apparent that the country was one election away from being ruled by an unprincipled strongman who might embrace every opportunity to become unaccountable to the law. My concern that the rule of law was in peril in the United States was sparked by a decision in a court case brought by an American citizen – styled *Al-Aulaqi v. Obama* – that sought an order preventing the government from killing him via a drone strike. (I had a very small role in this case, but more pertinent is the large part it played in catalyzing the definition of the rule of law I developed in *Permanent State of Emergency.*) The ruling that ended that case was chilling: it held that an American court could not secondguess the executive's decision to target an American citizen for extrajudicial killing. It dismissed the case for presenting a nonjusticiable political question (that is, in its view, one that a court of law should not answer), holding also that the target's father did not have standing to bring the constitutional challenge (that he could not assert his son's claim that killing him would be unconstitutional, as the court found he had no interest in that claim).

This citizen, whose right not to be killed without due process was never adjudicated, was subsequently targeted and killed in a missile attack. The next month, his sixteen-year-old son – also a citizen – was killed in another drone strike. Finally, in one of the first covert missions of the Trump administration, an eight-year-old citizen (the daughter of the first target and the half-sister of the second) was shot and killed in a raid by United States special operations forces. All the lawsuits alleging wrongful and unconstitutional killing related to these incidents were dismissed on the same basis as *Al-Aulaqi v. Obama:* Owing to the development of doctrines that effectively eliminate judicial review of actions the executive claims are necessary to national security, the American executive can violate its constitution with impunity. Yet when it makes use of

this impunity to deprive its citizens of life without due process, it also violates a nonderogable right.

This evidence that the United States has abandoned the paradigm of constitutional governance bound by the rule of law provides a stark illustration of the fact that this concept has both procedural and substantive dimensions. The procedural elements of the rule of law preserve the possibility of calling the government to account, while the substantive elements of the rule of law serve as the ultimate limits of its authority. The procedural elements comprise the "how" of this juridical concept while those which are substantive are the "why" of the rule of law. The *Al-Aulaqi* case makes the United States's departure from this paradigm of constitutional governance clear: if a government gains the ability to shield itself from judicial review, it can make use of this impunity to violate the most fundamental rights, even those which have previously been held to be nonderogable by that same country's constitution. Without judicial review, we have no durable rights, but it is these rights that give meaning to the procedural protections that would otherwise be meaningless formalities.

Unfortunately for those living through times of constitutional crisis, it becomes readily apparent from a close review of constitutional history that the procedural elements of the rule of law tend to receive considerably more attention during periods of stability than they do in times of instability or crisis; it is during those trying times that constitutional protections are either strengthened or destroyed. Normally, judges and lawyers strive to hold those in power accountable for quotidian misconduct; their arguments are aimed at making sure that the judiciary retains the ability to catch the government's attempts to pull a fast shuffle. That said, when a crisis begins, it is remarkable how quickly jurists need to recall that the rule of law was originally developed to prevent far more serious violations of rights, including indefinite arbitrary detention, torture, and extrajudicial killing. *Permanent State of Emergency* documents how quickly and how urgently that need arose in the United States between 2001 and 2017.

Canada has yet to face a serious crisis of the type precipitated by a major terrorist attack within the nation's borders, a terrifying possibility that many experts posit is a certainty. It is not too late for Canadian jurists to prepare for the onslaught on the rule of law that such am emergency inevitably precipitates. Accordingly, the focus of this volume is on the protections of the Constitution of

Canada, although American and English constitutional law remain significant to my analysis because of our shared legal heritage. When operating under the public perception of a serious threat to the nation's safety, any government is under tremendous pressure to push against the limits of these nonderogable rights. The jurists who police those boundaries will in such circumstances be forced to dust off cases from the last serious emergency: the task of reminding the government of the ultimate and inviolable boundaries of its authority must become an exercise in tracing precedents from one period of crisis to another until we reach the genesis of the rights at issue, a historical moment when a constitutional crisis was resolved by enshrining a nonderogable right that the population would no longer allow the government to violate, even should it assert some extraordinary rationale for doing so.

This effort in recovering the constitutional source of these nonderogable rights is difficult because we must often trace them back across the centuries. As every lawyer knows, many of the statutes of constitutional significance of the United Kingdom are from the early modern era, although some were enacted during the Middle Ages. They are no less important for being so venerable. Magna Carta's most famous (and still legally operative) clause is the promise that the Crown will not use extralegal force against those who owe it allegiance: "nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his peers or by the law of the land": this thirteenth-century prohibition applies squarely to the practice of targeted killing.

Having no modern experience of this heinous practice, the American legal order simply forgot about the sources of legal rights that were too trivial to mention in the text of its constitution, as the Ninth Amendment of the Bill of Rights merely observes that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Unfortunately, Canadian jurists have every reason to be as concerned as Americans with the fact that some of our most important rights are incorporated by only vague references to a constitutional history that was once but is no longer well understood. The preamble to the Constitution Act, 1867 (formerly known as the British North America Act) guarantees to Canadians a "Constitution similar in principle to that of the United Kingdom." Thankfully, in the twentieth century our Supreme Court has elaborated a jurisprudence of

the "unwritten constitutional principles" incorporated by this preamble, which include those that comprise the rule of law.

In this volume, my aim is to focus in particular on enumerating and recovering the meaning of the substantive protections of the rule of law, which are the core of the concept of the unwritten principles of the rule of law as it has been elaborated by Canadian jurists (in particular, Chief Justice Antonio Lamer). Recovering and building upon Lamer's historical approach to the sources of these rights is, in my view, a timely and pressing endeavour. In 2018, documents released pursuant to freedom of information requests revealed that the Canadian Armed Forces had participated in the targeted killing of Canadian citizens who had travelled to Syria to join the terrorist organization commonly known as isis. A memorandum obtained by journalists noted that lawyers for the military had observed that this act would raise "domestic legal issues" that remained unresolved.

The most prominent legal academic to comment upon this revelation opined at the time that the only rights of terrorism suspects that the government was bound to respect are found in the Charter, despite the fact that extrajudicial killing is directly contrary to the unwritten principle of the rule of law recognized by Magna Carta. The facts underlying this scandal parallel those in the *Al-Aulaqi* case and might ominously foreshadow the sort of constitutional crisis that I described in my last book. In that case, the Bush administration convinced the courts to accept an incomplete and unbalanced picture of the rule of law protected by the United States constitution. That proved critical to the acceleration of the abandonment of that paradigm of constitutional governance in the sustained crisis that followed after the 9/11 attacks, when targeted killing, indefinite arbitrary detention, and torture were incorporated into the American legal order.

One of the tasks I undertake in this volume is to explain how it is possible that modern-day jurists in Canada could lose the sense of history that was simply assumed by those who framed Canada's constitutional instruments of the eighteenth, nineteenth, and even the twentieth century. This project responds as well to another more pressing duty: to enumerate the legally binding sources to which the framers of the Constitution of Canada only gestured in 1867, namely, the constitutional statutes that formed the historical Constitution of the United Kingdom at the time of confederation. Having done that, it will demonstrate that these sources of

the substantive principles of the rule of law embed seven absolute rights into the Canadian constitution. Simply stated, these are the right not to be subjected to extrajudicial killing; the right not to be subjected to emergency measures that have no legal or constitutional justification; the right not to be tortured; the right not to be subjected to arbitrary detention; the right not to be subjected to cruel and unusual punishment or excessive bail; the right not to be punished for what is said in the course of parliamentary proceedings; and the right to be tried by an impartial judge who is a member of an independent judiciary.

For a constitutional historian, the identification of the sources of law that contain the unwritten constitutional principles of the rule of law is an easy matter. What is more difficult is demonstrating that lawyers and judges can be confident in their arguments about what these principles should mean today. Thankfully, there are judges who have demonstrated how these principles should be interpreted, a vital task to determining the contemporary scope of the rights that they create. The key problem is that judges and lawyers know less of the historical context of our constitutional history with each passing generation. Without the insights of jurists like Chief Justice Lamer (and his British counterpart, Lord Chief Justice Tom Bingham), derived from their deep appreciation of constitutional history, these principles may be lost to us. Thus this volume must address a fundamental problem: the sense of constitutional history that makes these insights comprehensible and keeps our most fundamental rights visible is now at risk of being lost, as new generations of jurists have little to no formal grounding in this history.

While Lamer and Bingham possessed a considerable amount of familiarity with the constitutional history that allows us to understand the importance and scope of the principles and rights contained in sources such as Magna Carta, the Petition of Right, the Act Abolishing the Star Chamber, the Bill of Rights, the Act of Settlement, and the Habeas Corpus Act, these pillars of our constitutional order are less likely to be encountered in Canadian legal education than ever before; legal history, once a required course in the curricula of law faculties, is increasingly unavailable even as an elective: "in the 1960s law schools that had taught what had amounted to English legal history in the traditional mode as compulsory subjects unceremoniously excised those courses from degree structures, without consideration of whether they should be

replaced by optional offerings."[1] Furthermore, even among experts in legal history, very few understand precisely how the principles found in statutes led to the recognition of legal rights, which is necessary to understand how the prohibition on torture – the legal source of which is a vital issue that many have misunderstood – came to be entrenched into our constitution. This, I believe, must change. Our constitutional order cannot have a future unless we understand that the substantive protections of the rule of law can only be found and understood if we pay closer attention to our past.

Despite these difficulties, Canada is in a position that is much more favourable to the recovery of the content and meaning of the principles of its rule of law than is the United States. Our legal order has not suffered from the inevitable dislocations that occur after a major terrorist attack and the state of emergency that invariably follows. Our constitutional history – in particular, its connection to the constitutional history of England and the United Kingdom – is considerably easier to trace. Moreover, there is in this nation a tradition of judicial awareness of the importance of this connection and of the central importance of the rule of law to our constitution. However, because the study of this tradition has largely lapsed within Canada's law faculties, a case must now be made for the importance of this history to our living constitutional tradition.

In setting out to make the case that the history of these constitutional principles remains meaningful and indeed essential, my aim is to do more than convince judges and lawyers of its usefulness when addressing particular points of law, however important these might be. I believe that it is possible to appreciate our constitution's history in a more general sense: interpreting the importance and scope of the rights these constitutional principles create remains vital to understanding who we are – and who we might choose to remain – as Canadians.

Thirty years before confederation, our national character was shaped when disparate communities joined together to fight for a vision of the constitution, against proponents of unbounded executive power who were willing to burn Parliament to the ground and seek annexation by the United States to defend their privileges. This history and the constitution are ours, if we can keep them; otherwise the demise of an increasingly vague and historically vacant rule of law will prove a self-fulfilling prophecy.

It is possible to present history – even the history of the constitutional crises that generated the substantive protections of the rule

of law – in a dry and pedantic manner that drains the colour out of even the bloodiest episodes; too often this is frequently considered the hallmark of good scholarship. One pertinent counterexample is Thomas Carlyle's romantic masterpiece *The French Revolution: A History*, a study that is still in print. Modern readers can see for themselves why Mark Twain chose it as his deathbed reading: Carlyle did not want his readers merely to understand what had occurred but to grasp why it matters and why it should motivate his readers' moral choices decades later. If this account errs on the side of fervour when presenting the achievements of our constitutional history, that is because it, too, came directly and flamingly from the heart.

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SEVEN ABSOLUTE RIGHTS

We all know what the constitution means; we all know what the first principle of it is, that the subject shall not be governed by the *arbitratum* of one man, or body of men. It is to the English Barons that we are indebted. History has not done justice to their conduct, when they obtained from their Sovereign that great acknowledgement of natural rights.

Pitt the Elder

Finding the Content and Meaning of the Canadian Rule of Law in Its History

The constitution of Canada is partly written and partially unwritten. The unwritten constitution includes all the great landmarks in British history in so far as they are working principles – Magna Carta, the Petition of Right, the Bill of Rights, the Habeas Corpus Acts, the Act of Settlement … A general consideration of these Acts in their terms and workings is the best introduction to the scheme of Canadian government.

W.P.M. Kennedy, *The Constitution of Canada (1937)*

The rule of law is unquestionably an integral part of the Canadian constitution. For jurists, the rule of law is also the central pillar of any legal order worthy of the name. It is impossible for us to imagine any constitution without it, since the origins of constitutions and constitutionalism lie in the history of attempts to instantiate this principle into the legal order; it is no exaggeration to say that constitutions exist in order to put the rule of law in practice.

This volume does not address the rule of law as a philosophical concept or as a feature of an abstract legal system nor will it theorize the nature of its relation to law; rather, it will describe the substantive principles of the rule of law as it now exists within the Canadian constitutional order, and it will provide an account of the history and the historical purpose of the rights they embed within the specifically Canadian instantiation of the rule of law. The Supreme Court's frequent recourse to Lord Bingham's text *The Rule of Law* demonstrates the need for supplementary literature on this subject written from a Canadian point of view. This volume aims to fill that void. It will demonstrate that it is also possible to view

English sources of the principles of the rule of law through a Canadian lens, namely, the one used at confederation.

While at the dawn of the twentieth century legal theorist Albert Venn Dicey popularized this phrase within jurisprudence, it was in common use approximately three hundred years earlier. That undervalued history is the chronicle of the many attempts to create and impose binding legal restrictions on governments – that is, to create enforceable and absolute rights – which led to the enactment of the principles that comprise the rule of law in Canada.

Constitutionalism is in essence the principle that a rule of law is desirable; it is scarcely an exaggeration to say that the history of all hitherto existing legal orders is the history of constitutionalism. Those who fought for it are known as constitutionalists: in the history of England, this group includes Henry de Bracton, whose ideals shaped the Magna Carta, and Edward Coke, who drafted the Petition of Right. In Canadian history, constitutionalism was the creed of the reformers who won responsible government and took power out of the hands of an executive power dominated by an insular oligarchy: foremost among the moderate reformers were Robert Baldwin, Louis-Hippolyte LaFontaine, and William Hume Blake, all familiar figures to students of Canadian history. In 1849, their victory redeemed the struggles of all those who had been fighting for habeas corpus and against martial law and other unconstitutional abuses for almost half a century – an achievement that came at the cost of the total destruction of the Parliament of Canada at the hands of the constitutionalists' enemies – and their vision remained dominant in Canada at confederation and for decades afterwards.

When the constitutionalists of each era of our legal history argued that no one must be above the law, they were not merely propounding an abstract principle of equality. Their practical goal was to impose substantive limitations on the powers of government. For a nation to be governed in accordance with the rule of law, its constitutional order must contain a comprehensive set of protections that prevent its most powerful actor from avoiding legal accountability when violating citizens' most basic rights. It is not enough for a nation to recite an aspiration within its constitution to become a rule of law state; it must create unbreakable restraints that bind the executive and prevent it from seizing enough power to obtain impunity to violate those rights in practice. It is these particular protections that comprise the substantive dimension of

the rule of law within any legal order, as history demonstrates that purely formal restraints count for nothing.

Yet despite its importance, and despite being identified by the Charter as the foundation of the Constitution of Canada, the rule of law is not defined there; this is an indication that its framers thought its meaning was clear. Until recent decades, constitutional history remained the primary means of identifying and interpreting its principles: the constitutional crises that generated the instruments that contain them were at the heart of every account of the Constitution of the United Kingdom upon which it was modelled, including William Blackstone's *Commentaries*, which was so convincing that it became an authoritative source of law. Owing to the importance of this history to the self-understanding of the judiciary and the legal profession, the significance of the historical development of the rule of law was obvious to those in the profession. This is increasingly no longer the case; accordingly, this volume must trace the embedding of these principles into the constitution back through Canadian and English legal history.

The preamble of the Charter states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."[1] This assertion was by no means novel; in 1960, the Canadian Bill of Rights similarly affirmed that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law."[2] Furthermore, that quasi-constitutional pronouncement followed hot on the heels of judicial recognition of the importance of this concept. In what is perhaps the most important case in the annals of Canadian constitutional jurisprudence – *Roncarelli v. Duplessis* – Justice Ivan Rand noted in his reasons that "the rule of law [is] a fundamental postulate of our constitutional structure."[3] This common understanding of the rule of law as "fundamental" to our constitution persisted as long as it was sustained by informed appreciation of the importance of the history of the rule of law's development. However, at present what remains of the legal profession's attachment to this paradigm of constitutional governance may be chiefly attributable to inertia, as the understanding of the history that explains and motivates its principles fades with each passing generation. That is what this volume hopes to demonstrate and, to as great an extent as may be possible, reverse.

THE ONGOING POPULARITY OF THE RULE OF LAW WITHIN THE LEGAL PROFESSION AND THE JUDICIARY

The invocations of this principle's importance without explanation of its content in the Charter and the Canadian Bill of Rights were only possible because, until recently, the rule of law has been well understood and valued by the Canadian legal profession. In every Canadian lawyer's legal career, he or she will experience the almost palpable sacred aura assigned by tradition to the rule of law: at their call to the bar ceremonies, generations of initiates have been brought out of their liminal state and into the profession only after being told in no uncertain terms that the preservation of the rule of law is their most important responsibility. This is also a message the profession sends to the public: The Law Society of Ontario notes in its external communications that "[t]he mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law."[4]

Unfortunately, the popular reverence for the rule of law that sustains it in dangerous times cannot survive on these invocations alone. If the profession's orientation to the rule of law is predicated on a sense of history that has degenerated to the status of professional folklore, it will not be able to resist the pressures of the twenty-first century; if lawyers and judges do not have the confidence to interpret even the most ancient and venerable constitutional principles, the rule of law may not survive the age of transnational terrorism, an age in which we repeatedly observe politicians proving themselves willing to destroy the constitution in order to save it.

A QUESTION OF USEFUL SCHOLARSHIP

Following the constitution's patriation, the Canadian judiciary has consistently upheld the principle that the rule of law is a binding limitation on the powers of government. In 2014, the Supreme Court of Canada acknowledged once again that the judiciary is the "guardian of the constitution,"[5] in a decision that also acknowledged that it was within the courts' power to determine the composition of the Constitution of Canada, which is only partially written and not limited to the provisions found in the instruments

listed in the Constitution Act, 1982 and the Constitution Act, 1867.[6]

This decision is not anomalous, for the judiciary has been consistent in its insistence that the constitution contains principles that are not found in those two texts, including those that comprise the rule of law. It has demonstrated a willingness to attempt to understand the historical context in which these protections were developed, as part of an effort to determine to what extent these protections should apply in the present day. Yet while judges have traditionally turned to historical scholarship when addressing venerable sources of law, this practice is now largely considered *passé*. This is unfortunate: as this volume will demonstrate it is impossible to formulate coherent arguments about the scope and the application of the substantive principles of the rule of law without devoting close attention to the historical context of the enactment of a set of constitutional instruments.

Over the last forty years, Canada's jurists have been forced to articulate the content of this nation's rule of law without substantial practical assistance from the country's legal scholars. Very little of what they can cite on the subject is contemporary. The majority of the Supreme Court's citations on the rule of law are to Dicey's *An Introduction to the Study of the Law of the Constitution*, a treatise from the late nineteenth century.[7] When the judiciary sought to examine the historical origin of the substantive protections of the rule of law (as Chief Justice Lamer did so ably in the *Provincial Judges Reference* when discussing the principle of judicial independence),[8] their resources have been even more limited.

The British constitutional theorist Martin Loughlin noted that "modern practice exhibits an ineradicable tension between the claims of reason and history ... today, it would appear, the claims of reason are again in the ascendancy. This shapes our understanding of public law, which is increasingly being conceived as a universal set of principles of constitutional morality."[9] This trend is visible even in England, where the interpretation of the nation's constitution would appear to demand a historical orientation. According to the constitutional historian John Allison:

> History has lost prominence in the general understanding of English constitutional law. The constitution was itself unmistakably historical in its evolutionary character and the recognized antiquity of its origins ... widespread failure, whether

> of lawyers or law academics, politicians or civil servants, to appreciate the diminution in historical understanding of the constitution, or to regard it as problematic, would itself reveal that diminution and would be added cause for concern.[10]

Allison attributes the diminution of the profession's awareness of the historicity of the constitution to the enduring influence of Dicey, which must be explored in detail. While Allison's negative assessment is largely correct, there are counterexamples that provide cause for optimism, many of which are found within the writings of members of the judiciary of the United Kingdom.

The first shining exception to the dearth of scholarship on the historical dimensions of the rule of law came a year after Allison wrote the words quoted above, in the form of a slim volume written by a former lord chief justice of England and Wales. Bingham's *The Rule of Law*[11] has been cited repeatedly by the Supreme Court of Canada since its publication in 2010. This recent history is a testament to the appeal to practising jurists of an approach to the principles of the rule of law that is grounded in legal history. Drawing on Bingham's approach, which will be illustrated by references to both his treatise and his judicial reasoning on this subject, this volume will outline each substantive principle of Canada's rule of law and then describe how these take shape within the framework of the Constitution of Canada.

This volume does not attempt to demonstrate that a historical approach to reconstructing the principles that comprise the Canadian rule of law is inherently superior to those that rely on an attempt to reconstruct its necessary or desirable features from the standpoint of analytic jurisprudence. Rather than offering a comparison of the two approaches, this volume will focus on demonstrating how much is to be gained when we understand the rule of law's origins. At a time when the judiciary is under substantial pressure to demonstrate that its vision of constitutional governance is not a reflection of its own desires, a historical reconstruction of the seven substantive principles that this volume identifies as indisputably part of Canada's constitutional order may well prove essential.

These seven principles are as follows. First, no one can be executed, jailed, or fined without an opportunity to answer the charges against them. Second, the government has no extraordinary powers to do what it otherwise has no statutory power to perform,

even if it claims that an emergency makes it necessary to override the constitution or the laws. Third, there can be no legal authority to torture, which can never be authorized by the government under any circumstances. Fourth, everyone who is detained by the government in any manner and in every place has the ability to obtain judicial review whether or not there is a valid legal basis for this detention, even during a public emergency. Fifth, the judiciary may not impose punishments or excessive bail without statutory authority. Sixth, no one can be criminally prosecuted for what they say in the course of proceedings that are necessary to the operations of Parliament. Seventh, everyone who comes to court is entitled to an impartial judge who is protected from state influence.

All of the rights protected by these principles are essential to the preservation of a constitutional order in which the executive remains accountable to the law and does not rise above it. It is the herculean task of legal philosophers to demonstrate why this must be the case in any given legal order. However, it is a far simpler matter to use the history of England, the United Kingdom, and Canada to show that these protections are embedded in our rule of law because without them the constitutional order would have degenerated into tyranny: the recognition of each principle and the creation of each corresponding right was a hard-won battle against the executive's attempts to create the rule of men. Had these battles not been won, we would have no rule of law.

This volume will demonstrate that there is a compelling reason to conclude that these seven principles and rights are indisputably part of Canada's rule of law, namely, they were indisputably part of the Constitution of the United Kingdom in 1867, when Canada was granted a constitution "similar in principle to that of the United Kingdom." The Constitution of the United Kingdom is conventionally referred to as an unwritten constitution, as no single document is the source of its constitutional law. However, every one of these seven principles is found in written instruments.

To be more specific, the sources of these seven principles are six statutes considered by jurists to be of constitutional significance, both in Canada at the time of confederation and in the United Kingdom today. They are Magna Carta, 1297 (as construed and amplified by the Six Statutes, which gave a more precise meaning to the concept of due process); the Petition of Right, 1628; the Act Abolishing the Star Chamber, 1640; the Bills of Rights, 1689; Act of Settlement, 1701 and the Habeas Corpus Acts. The heart of this

volume is, accordingly, the chapters that discuss the four constitutional crises in which these protections were recognized as essential to the rule of law, recognized in statutes following these crises, and subsequently embedded within the constitutions of England, the United Kingdom, and Canada.

The following chapters will demonstrate conclusively that there is a clear basis for recognizing what constitutes the minimum requirements of the Canadian rule of law; while it may contain more (derived from conventions and the common law, or more contemporary statutes), it cannot be said to contain fewer protections. Furthermore, these chapters will demonstrate how the judiciary can determine the proper scope of these protections in present-day practice: by following Lord Bingham's approach of careful attention to the historical context in which these rights were recognized, the judiciary can establish a solid and compelling basis for determining how these constitutional protections should be applied in the modern age. This book is an introduction to that historical context with that purpose.

The whole of this volume is divided into three parts. Each of their titles alludes to the central metaphor of Canadian constitutional law: as Viscount Sankey famously described it, the constitution is a living tree. This is meant to highlight the fact that a broad and progressive interpretation of constitutional principles and the rights that they create is wholly compatible with a historical orientation to their origin. Constitutional history will not be used to justify the conclusion that the constitution should not be extended to recognize more rights or the conclusion that it is not desirable for these rights to be interpreted more broadly. Rather, in the second part of this volume it will be employed to demonstrate that a certain set of absolute rights have repeatedly been deemed necessary to the continued existence of the rule of law. In the third and final part, this volume will demonstrate that a constitutionalist approach to the rule of law that was embedded within the Canadian constitution at confederation was due to a consensus about nonderogable rights created during the struggle for responsible government. It will then explain how we lost sight of that perspective during the twentieth century.

THE CONTENTS OF THE VOLUME

Part I: Uncovering the Pith: The Rule of Law at the Heart of the Living Tree

The first third of this volume has been given this title because it demonstrates that the rule of law forms the core of the Canadian constitution and that it remains vital only while the courts continue to recognize that this is the case. (However, it will also become clear that the judiciary of the United Kingdom has a more complete understanding than the judiciary of Canada does of the continued importance of those parts of our constitution that cannot be observed directly from a vantage point that does not take in English constitutional history.) This part will demonstrate that we can best reveal what lies at the heart of the constitution by means of scrupulous study and emulation of Bingham's approach.

Chapter One: The Courts, the Academy, and the Future of the Rule of Law in the Twenty-First Century

The first chapter sets the stage for the volume's key argument: that constitutional history is essential to a clear understanding of the substantive principles of Canadian rule of law, which must remain integral to the Canadian judiciary's understanding of the Canadian constitution for that paradigm of governance to remain intact. It begins with a discussion of the Supreme Court of Canada's recent jurisprudence on the rule of law and what the Court labelled the unwritten constitutional principles (which, it will be demonstrated, originate in the written statutes of the "unwritten" Constitution of the United Kingdom embedded into the Canadian constitution through its preamble). This discussion will focus on a line of cases that began with the *Patriation Reference*.[12] Next, it will examine the court's approach to outlining the contours of the rule of law at the turn of the twenty-first century, which began in 1998 with the *Secession Reference*.[13]

These cases acknowledged that the preamble to the Constitution Act, 1867 incorporated unwritten constitutional principles into the Constitution of Canada. However, the court adopted an *ad hoc* approach to identifying the principles; it has never attempted to enumerate them in the comprehensive manner that will be essayed in this volume. The first chapter will demonstrate that the im-

portance of this missed opportunity could not be fully appreciated during the conclusion of the twentieth century due to the prevailing optimism about the Canadian Charter of Rights and Freedoms. At the time, Charter jurisprudence on the limits of the rights it recognized was not well developed; for this reason, the importance of unwritten constitutional principles embedding nonderogable rights was not readily apparent.

As chapter 1 will detail, the Charter contains two means of restricting rights. The first is properly characterized as derogation; the second is limitation. Section 33 allows legislatures to pass laws notwithstanding the fact that they violate certain rights in the Charter, including the legal rights of Canadian citizens, which is a derogation process. However, while section 33 is relatively well-known, the history of the Charter's framing shows that none of the parties to the negotiations understood this to allow for violations of rights that are considered nonderogable under international agreements such as the International Covenant on Civil and Political Rights (ICCPR). Second, while section 1 of the Charter allows for limitations on rights, no one anticipated at the framing that it could be used to authorize violations of those rights in a manner that constitutes case-by-case derogations, as were later contemplated by the Anti-terrorism Act, 2015. Accordingly, the cases in which the court retreated from the task of recognizing the seven unwritten constitutional principles essential to the preservation of the rule of law pose a considerably greater latent danger to human rights than they initially appeared to do.

This chapter will discuss the court's increasing reticence during the first two decades of the twenty-first century to elaborate the content and scope of the rule of law's substantive principles, as demonstrated by a line of cases inaugurated in 2005 by *British Columbia v. Imperial Tobacco.*[14] The impetus for this new trend will be examined, along with the court's openness to possible exceptions to its new and seemingly restrictive approach to the rule of law. Particular attention will be devoted to *Charkaoui v. Canada,*[15] in which the court reacknowledged the possibility that the substantive principles of the rule of law could be invoked to strike down acts of Parliament that are contrary to the rule of law.

The final section of this chapter will examine what might impair the Canadian judiciary's reconstruction of the rule of law on the basis articulated in this volume. As the threat of measures taken in the name of national security to the rule of law were limned in

Charkaoui, that case demonstrates how important it is that both the content and the scope of the rule of law be defined with specificity while also demonstrating that future attempts to do so will likely encounter opposition. The chapter concludes with a consideration of how the judiciary might move forward on the overdue task of reconstructing the Canadian rule of law by reference to its history. It will demonstrate that the way forward has already been blazed by two judicial luminaries: one a former chief justice of Canada and the other a former lord chief justice of England and Wales. The former once beat the path through Canadian jurisprudence, while the latter has demonstrated where this journey might lead Canadians – if contemporary British approaches to the enumeration of the unwritten constitutional principles of the rule of law and to the historical approach to the determination of their appropriate contemporary scope are given due consideration in Canada.

In the *Provincial Judges Reference*, Chief Justice Lamer reasoned that the unwritten constitutional principle of the independence of the judiciary – in his view, an integral part of the rule of law – protected a right that was an integral part of the Canadian rule of law. He did so by examining the English statute that recognized this principle, the Act of Settlement, 1701.[16] Lamer's analysis of how and why this statute (which forms part of the unwritten Constitution of the United Kingdom) retains constitutional force in Canada was particularly compelling because it demonstrated how the historical context of the statute's enactment reveals the purpose it serves in Canada three centuries later.

This elaboration of Lamer's approach and its application to all of the substantive principles of the rule of law has been made considerably easier by the 2010 publication of a slim volume written by the late Lord (Tom) Bingham: *The Rule of Law*. Bingham demonstrates that the principles which form the rule of law can be identified and construed most adequately by those who understand their historical context and the meaning they acquired within the English constitutional tradition, which subsequently became Canada's.

Chapter Two: Contemporary British Approaches to Unwritten Constitutional Principles

The second chapter will elaborate Lamer and Bingham's approach to identifying and construing the unwritten constitutional principles that originate in the constitutional statutes of the United Kingdom. It will begin by discussing the relationship between recent British jurisprudence and what was outlined in the treatises that are known as the Books of Authority. The significance of these treatises to the unwritten constitution of the United Kingdom will be discussed in some detail before the chapter outlines the relationship between the approach found in these books – especially Blackstone's *Commentaries* – and contemporary British approaches to identifying the statutes of constitutional significance that contain what Canadian jurists labelled the unwritten constitutional principles of the rule of law.

This chapter will demonstrate why the approach adopted in the United Kingdom to identifying the relevant principles contained in those statutes is a key step towards determining the scope of the rights they continue to safeguard in Canada. This discussion will focus on a line of cases that includes *Factortame (No. 2),*[17] *Thoburn v. Sunderland City Council,*[18] and *R (Jackson) v. Attorney-General.*[19] These cases also demonstrate that the contemporary British approach to identifying the principles in the statutes of constitutional significance is entirely consistent with the approach outlined in the *Provincial Judges Reference*.

It will then explore the similarities between these instances of British jurisprudence and the post-Charter Supreme Court cases in Canada that discuss the rule of law, and it will distinguish these (particularly the *Provincial Judges Reference*) from earlier Canadian approaches to the unwritten Constitution of the United Kingdom. This chapter will conclude with a detailed analysis of the importance given to attention to historical context within Bingham's approach to determining scope and application of the unwritten constitutional principles of the rule of law. This recognition will motivate the volume's considered attention to Bingham's work in the chapters that follow.

PART II: HOW THE CANADIAN RULE OF LAW GREW: UP FROM ITS ROOTS

The second part of this volume sets out the historical context that jurists addressing the constitutional principles of the rule of law, particularly Lamer and Bingham, have demonstrated is essential

to understanding their meaning and scope. Each principle – and each absolute right that it protects – was recognized in the wake of a period of constitutional crisis, in which it had become apparent that the rule of law could not survive without them.

By this point in the volume, the first part will have demonstrated that a detailed understanding of the historical context of the origins of each of the statutes of constitutional significance that contain the unwritten constitutional principles of the rule of law is essential to any reconstruction of their meaning and the determination of their content and scope. This set the stage for the three chapters that follow, which will discuss the medieval, early Stuart, late Stuart, and nineteenth-century Canadian contexts of the explicit recognition of these principles within the constitutions of England, the United Kingdom, and ultimately, Canada.

These periods will not be discussed in isolation: each chapter will link one key moment in constitutional history to those that precede and follow it. As a result, this interstitial material will demonstrate how the intervening decades (or, in some cases, centuries) of gradual legal development witnessed the consolidation of a stable constitutionalist viewpoint. It is this perspective that explains the legal profession' enduring dedication to the rule of law, a commitment that became an invaluable resource during each successive crisis sparked by executive overreaching. The crisis that occurred in Canada at the cusp of the era of responsible government discussed in the final third of this volume came after the unwritten constitutional principles of the Constitution of the United Kingdom as it existed at confederation had already been integrated into nineteenth-century Canadian legal thought. That crisis demonstrated that the seven absolute rights recognized and embedded by the statutes containing these principles were considered by the Canadian constitutionalists of that period (which was the immediate context of the Constitution Act, 1867) to be nonderogable, even during serious emergencies that posed a danger to the existence of the state.

The second part of this volume will also demonstrate how the principles of the rule of law that were recognized and embedded in each of these periods serve specific functions within a constitutional order that preserves the supremacy of the law over the rule of men; each of these statutes was a response to a specific threat to that paradigm. The medieval era witnessed the creation of a constitutional order that included legal limits on monarchs that

they were bound to obey; these limits were monitored – but not yet enforced – by a newly created legal system and legislature that were not subject to direct royal control. In the seventeenth century, the question of whether these rights were absolute was settled. Within the constitutional settlement of the Glorious Revolution, limitations on executive power attained their modern form, after crises in which monarchs attempted to exploit ambiguities and lacunae in the existing constitutional restrictions in an attempt to expand their powers beyond limitation. In chronicling this history, the three chapters that comprise this part of the volume will demonstrate that all seven principles of the rule of law that emerged in this process are necessary to a constitutional order in which the executive is accountable to the law, and in which it is bound to observe any rights whatsoever.

Jurists educated in the mid-twentieth century could take their colleagues' grounding in constitutional history for granted. That is no longer the case, but these three chapters serve to provide later generations of lawyers and judges with an introduction to this historical context and to attune them to its continuing importance. The subtlety and sophistication of the use of history in Bingham's opinions and treatise can only become fully apparent to Canadian jurists once the history detailed in these chapters is recovered for the Canadian legal profession.

Chapter Three: The Middle Ages and the First Constitutional Statutes: Royal Authority, Law, and Process

The third chapter begins with a discussion of Magna Carta, 1297[20] and of the historical circumstances of the creation of the common law and parliament. The Magna Carta – specifically the sections that remain on the statute books to this day – was a necessary response to royal reliance on extrajudicial punishment, up to and including assassinations. King John acted as a law unto himself: the response was articulated in a document that gave much of that power to the judiciary exclusively and that was repeatedly reinterpreted to make the separation of the judicial function from executive power meaningful. This chapter will also describe the evolution of the concept of due process that Magna Carta enshrined, an evolution that took place primarily during the reigns of Edward II

and Edward III, as represented by the *Confirmatio Cartarum* of 1297 and the Six Statutes, which addressed due process enacted during the fourteenth century.

The historical core of the rule of law was already in place in England by the late medieval era; the development of the concept of a natural law which bound kings had led to the development of a theory of natural rights that the sovereign could not ignore. The transplantation of the norms of the *ordo iudicarius* into the common law created a new framework for the relationship between kings and subjects, which is properly considered constitutional in nature. This created the stable constitutional framework known as mixed monarchy, which would endure until the early modern era.

Chapter Four:
Stuart Theories of Extraordinary Prerogative and Legal Impunity Rejected

The fourth chapter will discuss the context in which the next two statutes of constitutional significance were enacted; these statutes contain the constitutional principles that the executive must govern by law under all circumstances and that torture can never be authorized by law. The Petition of Right, 1628 made it clear that national emergencies do not authorize the use of what the early Stuart monarchs considered their royal prerogative to operate above the law for reasons of state. The Act Abolishing the Star Chamber, 1640 stripped the Privy Council of its repressive quasi-judicial powers, including the right to issue warrants authorizing torture. This chapter will lay out the context of these reactions to royal overreaching, discussing in particular James I's resistance to limitations on the scope of his authority and accentuating the difference between his theory of law and kingship and the constitutionalist version elaborated by Sir Edward Coke, then lord chief justice of England.

The constitutional crisis that sparked the English Civil War was at its core a dispute about whether or not monarchs possessed certain extraordinary powers that were beyond all earthly judgment, including that of courts. That dispute was settled by the trial and execution of Charles I. The two key constitutional principles that were incorporated into the English constitution during this crisis confirm that a constitutional order cannot coexist with arbitrary

and extraordinary powers to violate the rights which were already established to be nonderogable.

The constitutional history of the early Stuarts provides clear instruction to those who study it in the present. It suggests that contemporary jurists might do well to cast a skeptical eye on claims that the executive must have extraordinary powers in order to protect the populace during emergencies, as this argument was considered by the constitutionalists of the early modern era to be inseparable from the king's attempts to obtain total impunity. Charles I attempted to use emergency powers grounded in an extraordinary royal prerogative that he asserted was itself above the law. The response was the statutory recognition of rights that could not be overridden in that manner and the abolition of special courts connected to the executive that refused to subject the king to the laws of the land. The constitutional history of this period also demonstrates that torture has never served a rational purpose but is always a tool of arbitrary power. The creation of a constitutional principle that eliminates even the theoretical possibility of a legal power to authorize torture provides a clear indication that those who framed this principle intended its scope to be interpreted broadly and purposefully.

Chapter Five:
The Glorious Revolution and the Modern Rule of Law

The fifth chapter discusses the statutes adopted during the restoration of the monarchy and after the Glorious Revolution – in other words, after the two constitutional crises that ended the Cromwell Protectorate and the late Stuart era. Parliament removed James II from the throne due to his attempts to avoid legal restrictions on his authority, particularly by means of a purported dispensing power, which he used to authorize his officials' refusal to comply with the laws. The installation of William III and Mary II as monarchs presented constitutionalists with an opportunity to entrench additional constitutional rights to deter any future attempts by the executive to raise itself above the law. They quickly seized that opportunity.

The Bill of Rights, 1689 embeds into the constitution a principle that blocks the executive from punishing legislators for what they do in the course of their deliberations and a principle that prevents

the judiciary from currying favour with the executive by imposing cruel and unusual punishment or excessive bail. The Act of Settlement, 1701 contains a principle that preserves the independence of the judiciary by creating lifetime appointments and security of tenure for judges, which further insulates them from pressure to serve as a tool of executive power. Finally, the Habeas Corpus Act, 1679 eliminated loopholes that allowed the Crown to subject dissidents to indefinite arbitrary detention. All of these substantive principles of the rule of law protect enforceable rights that are essential to the continued existence of the rule of law and the separation of powers.

The historical context detailed in the final chapter of this section shows why the framers of these three statutes of constitutional significance connected the principles they contain to the preservation of the constitutional order against governmental overreaching. The Stuart monarchs persecuted and ruined members of Parliament for discussing royal wrongdoing in the House of Commons, ignoring legal restrictions that dated back to the Tudors. They used compliant judges to punish those in royal disfavour far beyond what Parliament authorized: in one prominent example, a clergyman despised by Charles II was nearly whipped to death.

As Chief Justice Lamer reasoned in the *Provincial Judges Reference*, the independence of the judiciary is particularly important to the preservation of the rule of law. The executive's oppression of judges led to some notable abuses of power. The history of the late Stuart era provides ample demonstration that constitutional principles which protect the bodies charged with monitoring whether the executive complies with the laws – Parliament and the courts – are necessary, lest the executive become legally unaccountable in practice.

PART III: TRANSPLANTING THE RULE OF LAW: BENDING IN NEW WINDS OF CHANGE

The final third of this volume shifts its vision from the United Kingdom to British North America, soon to become Canada. The penultimate chapter of the volume will discuss the developments before confederation, while those that occurred after the framing of the preamble that embedded the substantive principles of the rule of law will be left for the final chapter, which will explain how that history came to be forgotten, and why.

The rule of law came to Canada in a particular context that shaped its reception decisively. The American Revolution shaped future disputes about executive power in the colonies that remained loyal to the United Kingdom, catalyzing a loyalist theory of the British constitution that was contested by successive generations of constitutionalists. This led to an explosive and ultimately decisive constitutional crisis in 1849. This period sharpened the Fathers of Confederation's vision of the Constitution of the United Kingdom and the substantive protections embedded within it. Their conception persisted until the twentieth century, but it quickly faded from view as the academy began to eclipse professional bodies as the key force shaping the self-identity of Canadian lawyers and, accordingly, that of jurists. These developments had the effect of depleting the historical consciousness of the legal profession and diminishing its appreciation of the substantive dimension of the rule of law. As this introduced an enduring threat to the legal profession's capacity to serve as the defender of the rule of law, these twentieth century dynamics will be explored in detail.

Chapter Six:
The History of Constitutionalism in North America and the Canadian Settlement of 1849

The sixth chapter will demonstrate that before confederation, the legal profession in Canada possessed a well-developed and insightful historical orientation to the constitution and its protections, which included significant appreciation for the seven principles examined in the second part of this volume. It makes this case with a detailed examination of the debate that developed in the early nineteenth century over the constitution's present-day meaning and application within Canada, a debate that related specifically to the protections provided by the rule of law. The conflict that developed between the loyalists and the moderate reformers recapitulated prior phases of constitutional development: Canadian constitutionalists addressed royalists' attempt to suspend or ignore the rights that had been won after the English Civil War and the Glorious Revolution.

This chapter will also demonstrate that the framers of the Constitution Act, 1867 did not draw their view of the unwritten Constitution of the United Kingdom onto a blank slate. The mean-

ing they accorded to the preamble reflected a uniform consensus about the interpretation of the substantive protections of the British constitution that had been forged in fire – both figuratively and literally, as the moderate reformers' defence of the principles of the rule of law was the catalyst of the loyalist rioting of 1849 in which the Parliament of Canada was burned to the ground.

The framers' consensus was rooted in the pointedly historical approach to the constitution that had attained prominence – and then hegemony – within the Canadian legal profession at the end of the eighteenth century, as this chapter will demonstrate. During that time, the constitutionalist views of the struggles of the early modern era were memorialized to the point that they became integral to the professional and personal ideologies of every lawyer in the colonies. The final phase of the struggle between the constitutionalists and loyalism began in 1838. In both Upper and Lower Canada, the Rebellions ushered in a period of struggle, both within and without the legal profession, over the meaning of the Constitution of the United Kingdom and the inviolability of the substantive protections of its rule of law. After the moderate reformers secured their ultimate victory with the achievement of responsible government, they began to inscribe this vision into the colonies' laws and legal infrastructure. In 1849, this led to an attempted *coup d'état* that was meant to overthrow the constitutional order.

This violent reaction to the full implementation of the rule of law in Canada led to the moderate reformers' finest hour and the total collapse of the ideological project of loyalism. As the erstwhile loyalists rejected the Crown and petitioned America for the annexation of Canada, the constitutionalist vision that had sustained the struggle for responsible government swept the field within the legal profession. As their opponents were expelled from public office, the constitutionalists began to reshape the legal profession in their own image, and the adherents of this vision of the rule of law began to dominate politics, the judiciary, and the law societies. Confederation, and with it the Constitution Act, 1867, was the final fruit of their labours, and accordingly it is essential that its preamble be construed in a manner that corresponds with the constitutionalism of its authors; their omission of any elaboration of the meaning of a constitution "similar in principle" to that of the United Kingdom was a simple reflection of the fact that in 1867, the legal profession understood implicitly that this phrase was to be interpreted in accordance with constitutionalist assumptions,

which held that the constitution's most important features were the substantive protections embedded within it after the victories achieved by earlier generations of constitutionalists in the medieval and early modern eras.

Chapter Seven:
Confederation and Beyond: Rule of Law from Universal Good to Chimera

This volume will conclude with an answer to a perplexing question. Given the importance of what has been detailed in this volume, how did our collective understanding of the historical context of the principles of the rule of law – essential to its meaning and significance – become occluded? In short, why was this volume necessary?

The answer will be found in the creation and flourishing of the legal academy – and to its many connections to a tradition of political theory that runs from Francis Bacon through Thomas Hobbes, Jeremy Bentham, and John Austin, theorists who were marginal for centuries, but who exerted an indirect and substantial influence on certain strands of twentieth-century legal theory. These figures form a countertradition to the constitutionalism that animated the rule of law, which defined itself in direct opposition to the vision of Coke and Blackstone. Law faculties, first in the United Kingdom, then in the United States and Canada, have since the nineteenth century become increasingly hospitable to theories of law that have ambivalent or hostile attitudes to constitutionalism.

The rule of law has an exceptionally simple principle at its core: it is the constitution, and not the government, that is the nation's ultimate authority; the government is not above the law. Every rule of law state instantiates the rule of law into its constitutional order in a unique manner, which reflects the history of responses to attempts by each state's government to assert itself over the laws. In Canada, as is always and everywhere the case, this paradigm quickly becomes meaningless if it is not protected by a number of substantive unwritten constitutional principles, including judicial independence, freedom of speech and debate in Parliament, and specific limitations on governmental powers.

The recognition of these principles embedded these nonderogable rights into our constitutional order. Canada possesses a rule of

law which embodies the choice to embed seven principles, found in statutes enacted after the constitutional crises of the past nine centuries. It was only by learning the lessons of history that the bench and bar were able to create the durable restraints on the government's powers that we take for granted today. This history explains not merely which features of the rule of law were embedded into our constitution at confederation but also the value assigned by the framers to that concept. As their vision of the Constitution of Canada will continue to face significant challenges, it is up to Canada's lawyers and jurists to decide for themselves whether this vision of the rule of law is worth defending. That choice can only be well informed if those making it understand its history.

PART ONE

Uncovering the Pith: The Rule of Law at the Heart of the Living Tree

1

The Courts, the Academy, and the Future of the Rule of Law in the Twenty-First Century

The preamble, by its reference to "a Constitution similar in Principle to that of the United Kingdom," points to the nature of the legal order that envelops and sustains Canadian society ... the Court explicitly relied on the preamble to the Constitution Act, 1867, as one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution.

Chief Justice Antonio Lamer, *The Provincial Judges Reference*

For rule of law to flourish in Canada, it is essential that the legal profession recover the historically informed meaning of its unwritten constitutional principles, which make our constitution meaningful in a time of crisis. Not only is this possible but it can also be made to fit within the concept of the rule of law as it has been outlined by the Canadian judiciary. Once recovered, lawyers and judges will be able to make more precise and principled arguments that draw upon this historical understanding of the rule of law when deciding the cases in which the seven absolute rights are at stake.

The Supreme Court of Canada has created a jurisprudential framework that contains the space into which it is possible and appropriate to fit this volume's reconstruction of the historical origins of the principles of our rule of law. This incorporation is possible, as it has been prefigured by the Supreme Court of Canada. Not only has the court's reasoning on the unwritten constitutional principles of the rule of law created room for the recognition of all seven principles but it has also constructed a framework within this room that allows these principles to be integrated in a harmonious manner, one that has the potential to provide the balance and symmetry that the framers of the Constitution Act, 1867 envisioned. Drawing on Chief Justice Lamer's famous metaphoric representation of the structural function of the preamble to that act, we might say that those who were present at Quebec, Char-

lottetown, and London did not design such a grand entrance hall to the constitution for it to lead only to an empty space.

Nevertheless, a review of the evidence makes it clear that judicial reconstruction of the rule of law in Canada did not proceed to completion. The Supreme Court's efforts in this area of law, as this chapter will show, were rebuffed by influential legal academics and tainted in the eyes of many for having been seized upon by litigants such as Imperial Tobacco. While a full consideration of the complex dynamics that produced this forceful reaction must wait until the final third of this volume, it is important at this stage to note how this resistance served to stall the court's momentum, with the result that we may now question whether a historical reconstruction of the principles of the rule of law can provide the weight of evidence needed to overcome this resistance before the pull of political forces outside of the legal profession's control make it permanently impossible.

Accordingly, this chapter will begin with a discussion of the Supreme Court's analysis of the preamble of the Constitution Act, 1867 in the late twentieth century, after the enactment of the Constitution Act, 1982 (which includes the Charter). It will then review the negative reactions to the court's elucidation of the unwritten constitutional principles of the rule of law and – although the justices' reply has been muted – the clearest expressions of how that criticism stung. The judicial retreat from further analysis has left the law of the constitution in a precarious state, which the next section of this chapter will explore: without clear recognition of the seven principles at the root of the Canadian rule of law and the nonderogable rights that they create, these rights themselves may be in danger.

The stakes having been established, the particularities of the precarious state of these constitutional rights – a precarity that increases when these nonderogable rights are conflated with Charter rights, which are not absolute – will be explored. This chapter will conclude with an examination of how the Supreme Court's retreat in its campaign to recognize the source and scope of the principles of the rule of law might be reversed and what such a counteroffensive might look like.

THE JUDICIARY AND THE CANADIAN RULE OF LAW AFTER THE CONSTITUTION'S PATRIATION

Today, most laypeople (and even most lawyers) believe that the most significant event in the history of the Constitution of Canada was its patriation in 1982. In that year the Parliament of the United Kingdom passed the Canada Act, 1982, which endowed the nation with full sovereignty by means of a power to unilaterally amend its constitution.[1] Not only did the constitution obtain new features at that time but it also renewed its prominence and popularity, as the nation rallied around a new understanding of the constitution's importance.

This renewed prominence predicated on Charter rights has positive and negative aspects: while the concept of constitutional rights gained new popular currency, the idea of rights shifted, particularly within the legal academy. The new instruments themselves made it clear that the constitution was considerably larger than the Canadian Charter of Rights and Freedoms, yet the ever increasing importance of the Charter to constitutional adjudication meant that, while still only a part of the Canadian constitution, the Charter increasingly became mistaken for the whole. Unfortunately, this unconscious synecdoche is misleading.

Those who wish to understand how Canadian courts have located the principles of the rule of law in the areas that predate the Charter must understand both the Supreme Court's articulation of the constitution's structure and the reasons why the rights recognized in 1982 are frequently misconstrued as a self-contained and closed set. Our review of these reasons begins with the most important court case during the negotiations that led to sovereignty, namely the *Reference Re Resolution to Amend the Constitution*, commonly known as the *Patriation Reference*.[2] In its ruling on this case, the Supreme Court of Canada held that it would be legal for Parliament to request (without the consent of provincial legislatures) that the United Kingdom amend the Canadian constitution, but that it would be contrary to constitutional convention to do so.

This decision emphasized the importance of the unwritten elements of the Canadian constitution and those that stem from English statutes when the majority noted that "[a] substantial part of the rules of the Canadian constitution are written. They are contained not in a single document called a constitution but in a great variety of statutes some of which have been enacted by the Parliament at Westminster ... many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar ... are nowhere to be

found in the law of the constitution."[3] The line of cases that began with *Patriation Reference* ended in 1998 with the *Reference Re Secession of Quebec*,[4] commonly known as the *Secession Reference*. These cases together elucidated a compelling theory of the relationship between the documents that we generally think of as comprising the constitution and the earlier Westminster statutes that contain, in many cases, the only references to our most fundamental constitutional principles.

The clearest explanation of the nexus of that relationship came in 1997 in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* (the *Provincial Judges Reference*). Writing for the majority, Chief Justice Lamer opined that the principles recognized by those English statutes – in that case, the principle of judicial independence as recognized by the Act of Settlement, 1701 – entered into the Constitution of Canada by means of the preamble of the Constitution Act, 1867, which, when it guaranteed a "Constitution similar in principle to that of the United Kingdom," created what Lamer memorably described as "the grand entrance hall to the castle of the Constitution" where the "true source of our commitment to this foundational principle is located."[5] The *Provincial Judges Reference* was a challenge to legislation from three provinces that, in essence, imposed salary cuts on judges. The professional associations representing the judges questioned whether allowing provincial governments to lower their salaries would undermine their independence and impartiality. In some instances, the government's response to the comments of individual judges appeared to establish that these concerns were well founded: Alberta Premier Ralph Klein said publicly that one judge who had spoken out should be "very, very, quickly fired," shortly before the case reached the Supreme Court.[6]

Lamer's opinion for the majority did not rush to find the relevant principles in the oldest and most obscure parts of the constitution, but the court was required to discuss these earlier sources of law because – as is the case for each of the seven absolute rights embedded by the substantive principles that comprise and protect the Canadian rule of law – more recent sources of rights did not address what had formerly been a well-settled issue, one that had been undisturbed for centuries. To get there, the opinion begins with an analysis of section 11(d) of the Charter. This guarantees the accused in a criminal proceeding a "fair and public hearing by an independent and impartial tribunal."[7] The majority concludes that

this does not create protections rooted in the office held by provincial judges, who (unlike the judges of superior courts) are also not protected by sections 96–100 of the Constitution Act, 1867.

At that point, Lamer concludes that it would be appropriate to consider whether the unwritten constitutional principles that comprise the rule of law mandate that provincial judges must not be at the mercy of a government empowered by legislation to deprive them of financial security. Drawing on the reasons of a unanimous court in *Reference Re Manitoba Language Rights* (the *Manitoba Language Reference*, decided in 1985), he notes that the principle of judicial independence was essential to the "maintenance of the rule of law" because it protects the courts and their function in our system of constitutional governance.[8]

Lamer grounds his justification of the importance and meaning of judicial independence in constitutional history. He notes that before confederation, judicial independence had been guaranteed to the justices of the United Kingdom by the Act of Settlement, 1701, which is "recognized and affirmed by the preamble to the Constitution Act, 1867 ... The preamble, by its reference to a Constitution similar in Principle to that of the United Kingdom, points to the nature of the legal order that envelops and sustains Canadian society."[9]

The source of the principle of judicial independence is, then, a document that the majority considered unequivocally to be a part of Canada's constitutional tradition. The judgment reiterated that there were unwritten constitutional principles that established rights that support all other rights; without impartial judges, the broader set of Charter rights might also become meaningless. The *Provincial Judges Reference* thus pointed the way towards an interpretive theory that might insulate the judiciary from charges of unaccountability and that would ground its understanding and ongoing application of the meaning and scope of the principles that form the Canadian rule of law and embed the related rights.

Finally, the judgment established that these unwritten constitutional principles of the rule of law were binding sources of law that legislatures must respect. The framers committed Canada to honouring the rights at the heart of the Constitution of the United Kingdom, seven of which are essential to the preservation of the supremacy of law. These principles, found in the constitutional instruments of the United Kingdom, foreclosed specific actions that had been used to subvert the rule of law. While the preamble en-

trenched a number of constitutional principles into the Canadian constitution, only these seven principles are indisputably part of our rule of law as it existed at confederation.

The United Kingdom is generally described as having an unwritten constitution, as no one document or set of instruments enumerates its contents, even in part. This is why the principles that are the focus of this volume are called "unwritten constitutional principles" in Canada, an unwieldy label that has bewildered certain academic critics, chiefly those who do not accord any significance to the constitutional history of the United Kingdom within Canadian constitutional interpretation. As a result, the Supreme Court's recognition of the continued importance of understanding the context of the embedding of these principles became controversial within the Canadian legal academy. This had the lamentable effect of hindering the recognition of the complete set of substantive principles of the Canadian rule of law. This criticism must be examined en route to a discussion of how the courts can move beyond it and return to the most critical of all the uncompleted projects of contemporary Canadian constitutional law.

Some academic criticism of the *Provincial Judges Reference* was notably waspish. One example is the book chapter written by Jamie Cameron (one of Canada's leading theorists of constitutional law) entitled "The Written Word and the Constitution's Vital Unstated Assumptions." Cameron's admonitions to the judiciary set the tone: her introduction warns that "When the judiciary strays outside the four corners of the document [the constitution] its legitimacy to exercise that power [against democratic institutions] is placed at risk."[10] She concludes by alleging that "the Supreme Court's 'unwritten principles'" jurisprudence is "unprincipled."[11] In between, she demonstrates a remarkable failure to engage with the substance of the court's approach. The rule of law, which was extensively discussed in the opinions she recognizes, is passed over without a single mention.

Furthermore, Cameron's argument betrays no concern for the underlying problem that was revealed by the *Provincial Judges Reference:* that there is a long history of governments – democratically accountable or otherwise – making changes to the constitutional order that serve to elevate them above the law. Instead, Cameron is preoccupied with the spectre of a Supreme Court that, having "refused to accept limits on its authority to interpret the Constitution ... succumbed to the temptation to constitutionalize extra-

textual values." She labels this process "lochnering" (after a period known as the Lochner era, during which the Supreme Court of the United States sometimes struck down legislation that they held violated freedom of contract and infringed property rights, claims most frequently asserted by powerful business interests).[12] In essence, her criticism is predicated on the concern that a conservative court could identify unwritten constitutional principles that would allow it to thwart progressive policy initiatives; she betrays no fear that the institutions responsible for the initiatives the court thwarts – namely, those associated with government – might ever seek to exceed their own powers or be anything other than progressive.

Within this narrative, the judiciary is viewed with suspicion, while the government (purportedly the possessor of democratic legitimacy, an assumption given very little scrutiny) is accorded every possible benefit of the doubt. It is sobering to consider the time at which these critics adopted this approach: Cameron's article was published in 2002. In the context of the governmental overreaching that loomed large over the American constitutional order in the wake of the 9/11 attacks, these scholars' *idée fixe* – that the judiciary should "accept limits on its authority to interpret the constitution"[13] because of abstract concerns that it might stand in the way of new social programs – appears strangely disconnected from contemporary problems.

In the decades that followed, courts in Canada as in the USA would be put under sustained political pressure from governments that occupied the bully pulpit after terrorist attacks catalyzed widespread support for unconstitutional measures. Unfortunately, like generals, certain academics are always preparing to fight the last war, but fulsome examination of their fear that strong courts will impede a general popular will to implement progressive social change must await the third part of this volume. Before we can turn our attention to that subject, another perplexing feature of certain Canadian constitutional theorists' criticism of the Supreme Court's approach to the unwritten constitutional principles of the rule of law must be explored. That is their collective inability to grasp that the unwritten constitutional principle of the rule of law addressed in the *Provincial Judges Reference* originates in clear and unambiguous written sources.

Cameron's failure to acknowledge the written roots of the unwritten constitutional principles is typical of this inability. The

foundational premise of her criticism of the court – that it is becoming unaccountable by privileging unwritten principles over the written text of the constitution – is in fact built on sand. When discussing the constitution, she fails to note that the preamble's explicit guarantee of "a constitution similar in principle to that of the United Kingdom" is not only within its text but also given pride of place. Cameron does not even attempt to define the meaning of this crucial phrase; instead she simply ignores it. Clearly, acknowledging it would be fatal to her claim that the court's interpretation of the constitution is only legitimate when it gives primacy to the written text. Excising the preamble's guarantee from the constitution would be more consistent with her imperative.

It is possible to locate the source of this anxiety by scrutinizing the remainder of Cameron's argument. When concluding, she qualifies her objections by stating that "except in compelling circumstances, where history, convention, and practice provide corroboration, the Court should not create substantive obligations that bear no connection to the text."[14] This purportedly restrictive exception is, of course, an apt description of every circumstance in which the court has recognized the substantive principles of the rule of law. In the *Provincial Judges Reference*, the textual sources are the preamble and the Act of Settlement, 1701. That said, Chief Justice Lamer discussed this mainstay of the Constitution of the United Kingdom as if he could simply assume that his audience accepted the promise that the historical context (and the embedding of the principle of judicial independence in particular) was of ongoing importance to the interpretation of the Canadian constitution. This assumption – one which this volume seeks to redeem and vindicate – led, in part, to the court's rude awakening at the hands of the academy's intemperate response.

The approval of Cameron's criticism by some of Canada's leading constitutional theorists demonstrates that they do not recognize that uncovering the relevant textual evidence might require sustained engagement with constitutional history and recognition of the continuing importance of that history to the project of constitutional interpretation. This implicit antipathy to reliance on pre-confederation history in the court's interpretation of the preamble of the Constitution Act, 1867 passed unnoticed by most Canadian jurists, while the justices were prohibited by convention from responding directly. However, in those exceptional circumstances in which the justices were free to reply, most notably at conferences

devoted to their colleagues' legacies, their responses were illuminating, even searing.

Speaking at a conference in honour of the life and work of Justice Charles Gonthier in 2011, Justice Binnie noted that the eloquence of the metaphors in the *Provincial Judges Reference* ran against the grain of a "system that prized blandness, but when we look at what the courts have done in this area [of unwritten constitutional principles] the result seems to me by and large to be sensible."[15] Binnie's frank criticism of the academic reaction is worth considering in detail, since it helps to set up a key question: why is the Canadian legal academy so opposed to the recognition of unwritten constitutional principles, which – as this volume will demonstrate – can easily be enumerated and defined by recourse to a well-settled understanding of constitutional history?

Binnie notes that, while the "written constitution is spread over thirty documents," it "explains little about how our system of government actually operates."[16] This is manifestly true: as the constitution makes no reference to either the prime minister, ministries, or the cabinet, and is without reference to the constitutional convention of responsible government, a literal reading of the Canadian constitution would lead to the conclusion that Canada is governed by an absolute monarch. It is only our understanding of the constitutional principles located in English statutes that explains why the possibility of the queen's exercising the power to refuse royal assent "has passed so far away from the minds of men that it would terrify them, if she exercised it, like a volcanic eruption from Primrose Hill."[17] Binnie then archly notes that it is rather rich for Professor Peter Hogg, "a leading commentator on all such matters," to write "in a state of apparent anxiety [that] ... such unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy."[18] Quite logically, then, Binnie concludes that the "sensible approach, it seems to me, is not to conjure up fears and anxieties, but to look at how in fact the courts have employed unwritten constitutional principles."[19] Indeed, it can easily be demonstrated that the courts have been principled and responsible when outlining and applying them.

It is perplexing that some of the leading lights of Canadian constitutional theory appear to assume that it would be impossible to determine whether the courts are committed to a sincere and principled engagement with pre-confederation constitutional

history or if this merely disguises unprincipled judicial activism. This is also unfortunate, as this volume will argue that a detailed reconstruction of that history is the optimal way of recovering the textual basis of the unwritten constitutional principles of the rule of law, which would allow the judiciary to elaborate its content and scope in a principled manner – a pressing and timely endeavour. Thankfully, it is possible to demonstrate that this task is not only possible but also done with regularity in the United Kingdom, even as the Canadian judiciary has been confronted by academic criticism that is hostile to Binnie's "sensible approach." The motivation necessary for this endeavour can only be found in a review of the stakes of this dispute in the post-Charter era.

THE IMPORTANCE OF THE PRESERVATION OF THE ABSOLUTE RIGHTS THAT PREDATE THE CHARTER

Binnie's outline of the structure of the Canadian constitution may appear to lawyers trained in Canadian law faculties since the 1980s to be close to esoteric knowledge, at least when compared to the popular view of the constitution that developed after patriation. Many Canadians believe that all their constitutional rights can be found on the face of the Charter. Very few members of the general public know about the Canadian Bill of Rights, while the number who understand that still more rights are founded on constitutional conventions or in imperial statutes like the Bill of Rights, 1689 is vanishingly small. This is despite the fact that the Charter makes explicit reference to these other sources of rights: section 26, for instance, states that "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."[20]

Some important rights preserved by the Charter's saving clause can be found in the Canadian Bill of Rights, which protects Canadians from being deprived of the enjoyment of their property except after a hearing that meets the minimum requirements of fundamental justice. Additionally, the Canadian Bill of Rights makes it clear that there are other rights protected by statutes, constitution conventions, and the common law that predates it; thus this instrument serves as another link in the chain back from the Charter to the rights guaranteed by the preamble to the Constitution Act, 1867. The Canadian Bill of Rights' savings provision states, "Nothing in Part I shall be construed to abrogate or abridge any human

right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act."[21]

When the Canadian Bill of Rights was enacted in 1960, Canada was not a party to any binding international treaty protecting these rights: for example, the International Covenant on Civil and Political Rights (the ICCPR) did not come into force until 1976. Accordingly, the Canadian Bill of Rights acknowledges the existence of rights that, owing to the date of its enactment, must have their origin in the Constitution Act, 1867, without saying so explicitly. However, as many leading scholars – including Hogg – have treated this instrument as a historical curiosity,[22] its clarification of the meaning of section 26 of the Charter's recognition of rights has passed largely unnoticed. Hogg drove past the signpost without taking note of the direction that it points: squarely towards the past. The misapprehension that the Charter is the only source of rights that matters is, consequently, shared by both the public at large and most Canadian constitutional scholars, even if the judiciary has made it clear that this is not the case.

The danger of implicitly reducing the set of constitutional rights to only those found in the Charter has become more readily apparent in the twenty-first century. The key examples to which this volume will repeatedly return are the amendments to section 12 of the Canadian Security Intelligence Service Act introduced in 2015. Section 12 now allows for warrants authorizing breaches of the Charter, and it does not acknowledge any other source of rights that could operate as a check on the government's emergency powers, despite the fact that the statutes that form the unwritten constitution of the United Kingdom – as the second third of this volume will demonstrate – were enacted for that very purpose. The Charter is a more pliable instrument than the statutes of constitutional significance that contain the unwritten principles of the rule of law that embed non-derogable rights, owing to its incorporation of provisions for limitation and derogation. In the twenty-first century these devices are frequently included by the framers of constitutional instruments to counterbalance expansions of rights, but, as this volume will demonstrate, this practice has the effect of transforming the core meaning of rights from hard limits on governmental power to guidelines that must give way to compelling governmental objectives, especially during emergencies.

Derogation is a concept that was imported from the civil law tradition common to continental jurisprudence into international

law and then finally incorporated into Canadian constitutional law in the Charter, although not without difficulty and controversy. In essence, this concept justifies a temporary suspension of a legal right, for instance, during a crisis. The ICCPR provides an example of this approach to international human rights, which are otherwise sacrosanct. It sets out a broad set of rights that its signatories are bound to respect and then establishes what these governments must do in order to ensure these rights are meaningful. Then, in article 4, the ICCPR allows that "[i]n time of public emergency ... [parties] may take measures derogating from their obligations under the present Covenant."[23]

However, the ICCPR recognizes that certain rights are nonderogable, even during an emergency that threatens the life of a nation. For example, the Convention notes that rights not to be arbitrarily killed, not to be tortured, and not to be subjected to prolonged arbitrary detention can never be suspended, no matter what the emergency. Furthermore, the ICCPR's recognition of absolute rights exempt from derogation is not new. It is also in keeping with the consensus position that emerged within the legal profession worldwide after the Nuremberg Tribunals and the creation of the Charter of the United Nations;[24] this was to be merely the adoption of a perspective on rights that had been dominant within Anglo-American constitutional discourse by the eighteenth century: by the time it was written, every single one of the rights designated as nonderogable by the ICCPR was protected as absolute by the unwritten constitution of the United Kingdom.

On the existence of nonderogable rights prior to the emergence of the new international order after the Second World War, the ICCPR's three key examples of nonderogable rights, mentioned above, are instructive. We may note that William Blackstone wrote about the first two in 1765 when he commented that "[T]he constitution is an utter stranger to any arbitrary power of killing" and that the common law's rejection of torture was "one of the proudest boasts of English jurisprudence." As for the third, the Habeas Corpus Act, 1679 has for centuries prevented emergency detention from becoming prolonged or arbitrary.[25] That said, the fact that these rights were well settled long ago means nothing if the government fails to acknowledge their existence.

THE CHARTER'S EFFECTS ON THE INTERPLAY OF ABSOLUTE RIGHTS AND DEROGABILITY

Initially, it seemed that the Charter would solve the problems presented by an unenumerated set of constitutional rights. Unfortunately, its provisions for the derogation and limitation of rights may yet prove to be its Achilles' heel. To understand how these provisions entered into the text of the Charter, we must return to its framing. While there are numerous inconsistent accounts of the bargain struck between the provinces and the federal government that paved the way to patriation – perhaps as many as the number of politicians who participated in the events described as the "Kitchen Accord" or the "Night of the Long Knives" – certain elements remain undisputed.

None of the accounts of the negotiations argues that the notwithstanding clause had been advocated by the federal government; Prime Minister Pierre Elliott Trudeau had put his opposition on the record repeatedly. While a provision of that type had been discussed in abstract terms within policy circles after Barry Strayer wrote a policy paper in 1968 entitled "A Canadian Charter of Human Rights,"[26] the first concrete discussions about its inclusion occurred in 1979, "when Premier Lougheed of Alberta referred to a notwithstanding clause as one possible means of making the Charter less unpalatable to some provinces."[27] It was given due regard by the federal government only because it was thought to be necessary to secure provincial support.

The traditional account of the Kitchen Accord recounts Trudeau's reluctance to agree to the notwithstanding clause until the attorneys general of Saskatchewan and Ontario persuaded the federal minister of justice to advocate it and after the premiers of New Brunswick and Ontario assured Trudeau that it would serve to secure the near-unanimous support of the provinces, sidelining Quebec's objections. While the former premier of Newfoundland Brian Peckford has challenged this account, his version also presents the provinces advocating for the adoption of what became section 33.[28] Accordingly, it remains clear that the notwithstanding clause (in French, the *clause derogatoire*) was designed to allow provincial legislation to derogate from the Charter.

Strayer, who served as the principal drafter of the Charter, notes that the federal government of the time had no interest in a provision that would allow the federal government to derogate from fundamental rights in a public emergency, as had existed in the former section 6 of the Canadian Bill of Rights prior to the adoption of the Emergencies Act, 1988. The rejection of the derogability of

fundamental rights in public emergencies is further demonstrated by the repeal of the War Measures Act, which also repealed section 6 of the Canadian Bill of Rights. Its replacement, the Emergencies Act, states in its preamble that emergency orders by the governor in council would be subject to the Charter, the Canadian Bill of Rights, and the ICCPR, which a report of the Law and Government Division of the Parliamentary Research Branch concluded commits the government to treating those rights enumerated in article 4 of the ICCPR as nonderogable, even in major public order emergencies.[29]

Since the enactment of the Charter, the federal government has never expressed an intention to invoke the notwithstanding clause, which had only been adopted at the provinces' insistence. It has never been invoked by Parliament, and in 2006 Prime Minister Paul Martin proposed a constitutional amendment to abolish the federal government's power to invoke the clause. Instead, it has only been successfully used by two provincial legislatures, to protect laws that implicate delicate social questions about language rights and funding for separate schools.[30]

THE RULE OF LAW AND ABSOLUTE RIGHTS IN AN ERA OF TRANSNATIONAL TERRORISM

Despite the intentions of its framers, and despite the federal government's historical lack of interest in invoking it, section 33 remains a latent threat for the adoption of emergency legislation that would derogate from Charter rights. While this would be unprecedented, serious crises typically do generate unprecedented threats to rights. That said, at present it is difficult to imagine that section 33 could be used by the government to push through legislation that would violate sections 7 and 10 of the Charter in a way that would allow for serious violations of the rights protected by the substantive principles of the rule of law, such as prolonged arbitrary detention without access to counsel. Unfortunately, the Anti-terrorism Act, 2015 (the former Bill C-51) demonstrated that a government need not argue that it has the power to derogate from these rights, as long as it possesses the ability to limit them.

An application for a disruption warrant made after a significant terrorist attack might request the authorization to do what would otherwise violate a number of a suspect's Charter rights. It might ask that someone about whom there is no evidence (other than potentially innocent association with other suspects) be subjected to

arbitrary detention in a manner that would otherwise violate section 9. It could also request that he or she be held incommunicado and without access to counsel, which would circumvent section 10(b) and request, further, to suspend his or her right to challenge the legality of this form of detention, which would otherwise offend against section 10(c). csis might argue that this treatment is justified owing to a serious threat of a catastrophic attack if information is not obtained from those detained and interrogated under these conditions, presenting some iteration of what is popularly known as the "ticking bomb" scenario.

The act asks judges to consider whether a violation of a Charter right is justified by the government's allegation of a threat to national security. As leading scholars of national security law such as Kent Roach and Craig Forcese have noted, the test of reasonableness in this context draws upon the approach to the Charter outlined in *Doré v. Québec* (*Tribunal des professions*).[31] This approach would mandate a free-floating consideration of whether any particular infringement can be justified by reference to a threat to national security. On the face of the Act, it appears that if a single judge concludes (in a confidential *ex parte* proceeding) that national security demands it, terrorism suspects could be subjected to what is known in international law as "involuntary disappearance." In common parlance, they could be "disappeared." International law is particularly uncompromising in its approach to this issue,[32] not merely because it violates a nonderogable right but because in countless emergencies, incommunicado detention has served as a prelude to the violation of other nonderogable rights, by means of torture and extrajudicial killing.

The use of section 1 as a means of limiting particular individuals' nonderogable rights is far from what was initially envisioned when the Charter was framed. The idea of a limitations provision had been raised in Bill C-60 in 1978, which was part of an abortive attempt by the Trudeau government to draft a charter of rights.[33] Barry Strayer was concerned as early as 1967 with the problem of limitations on rights, which he divided into a taxonomy of general and specific (i.e., related to "special situations") that he later drew upon when outlining what would become sections 1 and 33.

Strayer recounts that he modelled the "very broad" language of section 1 on "an amalgam of limitations permitted of particular rights in various of the international rights instruments."[34] Like section 33, section 1 was included in order to appease the prov-

inces, as it would "preserve the legislative supremacy so ardently guarded by most provinces."[35] His account would serve to clarify much about the meaning of the section, if the legislative intent is held to be pertinent to its interpretation. The confirmation that section 1 was modelled on the limitations provisions of international instruments is particularly illuminating. Foremost among these was the International Covenant on Civil and Political Rights, which contains a derogation regime in article 4.[36] However, that article contains an express provision specifying that certain rights are nonderogable even during a public emergency.[37]

Strayer's comments on the evolution of what would become section 1 also explain why it does not contain a similar reference to the nonderogability of such basic rights, despite the fact that such a position is required owing to Canada's obligation to give effect to the ICCPR's provisions.[38] If section 1 was designed to protect provincial legislation from judicial intervention, a reference to nonderogable rights would be superfluous; due to the nature of Canadian federalism, assertions of power that might implicate the rights specified as nonderogable by article 4 of the ICCPR (*inter alia*, not to be extrajudicially killed, tortured, or subject to prolonged arbitrary detention) would undoubtedly fall within exclusive federal jurisdiction.

Additionally, Strayer never explicitly contemplated the use of section 1 by Parliament to justify the limitation (really the effective derogation) of rights specified by the ICCPR as nonderogable, with which he was intimately familiar. Nevertheless, owing to the evolution of section 1, if Canadians' right not to be killed, tortured, or subjected to prolonged arbitrary detention depends solely on the enforcement of the Charter, there is a serious risk that this will be put in jeopardy should the government rely on the interpretation of section 1 that is foreshadowed by the Anti-terrorism Act, 2015. Accordingly, judicial recognition of the seven unwritten constitutional principles of the rule of law that defend Canadians' nonderogable rights cannot wait. Meanwhile, perhaps there is some satisfaction to be had in noting that, while the Supreme Court has not moved forward towards that goal, it has recently stopped moving backward, just as the stakes of allowing the government free rein in matters allegedly related to national security have become clear.[39]

THE SUPREME COURT'S RETREAT FROM THE RULE OF LAW AND THE SEARCH FOR A RALLYING POINT

Defenders of the unwritten constitutional principles of the rule of law were obliged to fight a rearguard action during the first decade of the twenty-first century. In *British Columbia v. Imperial Tobacco,*[40] the reasons of the majority (penned by Justice Major) raised doubts about whether legislation could be struck down for offending against an unwritten constitutional principle, even if that principle was part of the rule of law. The majority defined the rule of law in an exceptionally narrow manner, one that "is procedural enough to support almost any legislative objective, however morally objectionable."[41] Referring explicitly to academic criticism of the late twentieth-century cases on the preamble, the majority's reasons labelled the rule of law as a concept that was insufficiently precise[42] and concluded that the "best interpretation of the rule of law is one that contains as little as possible."[43] Finally, the majority held that where the Charter guaranteed a specific right, the principle of *expressio unius est exclusio alterius* – the express mention of one thing excludes all others – prevents the recognition of an unwritten constitutional principle that would grant broader protection.[44]

It is difficult to reconcile this approach with the reasons penned by Chief Justice Lamer in the *Provincial Judges Reference*, as the latter found a principle that stood behind and was broader than the right to an unbiased tribunal in a criminal proceeding founded on section 11(d) of the Charter, on the basis of a clear textual source that is much older than the Charter or even the Constitution Act, 1867, namely the Act of Settlement, 1701. The fact that the unwritten constitutional principle in that case had not been drawn from thin air escaped attention, just as it had in the scholarly criticism – particularly Cameron's – that broke the path for the judgment in *Imperial Tobacco*.

Imperial Tobacco and its progeny have been characterized by the legal historian and constitutional scholar Mark Carter as a return to a positivist approach to adjudication, which avoids normative reasoning when the terms of the relevant constitutional provisions are narrow enough to avoid doing so: an approach that would keep the court clear of the academic criticism that came in the wake of the *Provincial Judges Reference*. Nevertheless, Carter predicted that certain types of cases would likely provide an opportunity for the court to redevelop an approach to the rule of law that takes the

unwritten elements of the constitution seriously. By reserving the most far-reaching kind of normative constitutional analysis for situations where the text of the constitution is silent or contains open-textured language, Carter suggested, the court can strike the appropriate balance between the judiciary's obligation to uphold both the unwritten and written parts of the constitution.[45] Subsequent events have provided tentative validation of Carter's expectations.

At the beginning of the era of transnational terrorism, it remained to be seen whether the Supreme Court would cleave to the theory of the rule of law found in *Imperial Tobacco* or the *Provincial Judges Reference* when presented with a case where the government clearly infringes one of the seven absolute rights embedded by the unwritten constitutional principles of the rule of law incorporated by the preamble. *Imperial Tobacco*, it should be noted, did not involve rights connected to the historical core of the rule of law. Rather, these cases involved attempts to treat the rule of law, in the words of a reject judgment of the Federal Court of Appeal, as "an empty vessel to be filled with whatever one might wish from time to time" when in fact "it has a specific, limited content in the area of constitutional law."[46] Such an approach to the rule of law appears particularly unseemly when the plaintiff doing the pouring is a multinational tobacco conglomerate attempting to protect itself from the consequences of giving millions of Canadians cancer.

THE RALLYING POINT AT THE END OF THE COURT'S RETREAT: DOES CHARKAOUI PREFIGURE A NEW STAND?

The case brought by Adil Charkaoui was very different from *Imperial Tobacco*, since it involved violations of rights that had been protected by the rule of law for centuries. Charkaoui, a Montreal pizza maker who was allegedly associated with certain unnamed terrorists, was arrested in 2003. Rather than being charged with a crime, he was held on the authority of a security certificate prepared by csis and signed by the minister of Citizenship and Immigration that alleged he was a threat to national security. This conclusion was later revealed to be based on what can only, with considerable charity, be considered poor reasoning, including the claim that an interest in martial arts was an indicator of having received terrorist training, since the 9/11 hijackers had trained in martial arts. (The same was true of the justification for the confinement of his

coappellants Almrei and Harkat: the courts ultimately concluded that csis had committed a breach of its duty of candour to the court and relied on noncredible sources in Hassan Almrei's case;[47] in Mohammed Harkat's case, after disclosure was ordered, csis claimed to have destroyed the original files that it alleged contained the evidence it had relied upon.) Charkaoui had been imprisoned for two years, and when released on bail he was effectively placed under house arrest.

Charkaoui, along with Almrei and Harkat, challenged the constitutionality of the regime that allowed for their detention by means of security certificates. The Supreme Court ultimately concluded that this procedure, which allowed for secret evidence to be presented to justify imprisonment without any opportunity to be challenged by the detainee or his counsel, violated sections 7, 9, and 10 of the Charter. The sections of the legislation that had authorized such serious violations of the right to liberty, freedom from arbitrary detention, and the right to legal counsel were struck down. Furthermore, despite not needing to find a violation of any unwritten constitutional principles to grant the relief requested, the judgment addressed the rule of law. Quoting *Imperial Tobacco*, it concluded that "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation ... based on its content. Even if this dictum leaves room for exceptions, Mr Charkaoui has not established that the *IRPA* should be one of them."[48] While this statement is not a positive endorsement of the recognition of nonderogable rights predicated on the unwritten constitutional principles, it does leave open a space for those who would seek such recognition, although it is a narrow one. The provisions of the Anti-terrorism Act, 2015 demonstrate why such an opening is still necessary after *Charkaoui:* the detention provisions at issue in that case were held not to be arbitrary because judicial review was mandated within 120 days. Moreover, detention warrants after Bill C-51's amendment of section 12 of the csis Act might not provide for the oversight mandated by *Charkaoui*, a situation that would force the Supreme Court to answer the question that it pointedly noted it did not need to address in that case.

The judgment in *Charkaoui* corresponds with Carter's prediction about the type of cases that might likely lead the Supreme Court to reaffirm its ability to overturn legislation that offends against the unwritten constitutional principles that comprise the Canadian rule of law. The government has repeatedly reiterated that it must

treat the likelihood of a major future terrorist attack as a certainty. If this accurately characterizes the government's approach, then what follows is that the eventual adjudication of this issue is unavoidable. And if section 12 of the csis Act is used as intended by those who amended it in 2015, then the only source of protection against conduct the Supreme Court condemned in 2007 will be the unwritten constitutional principles that comprise the Canadian rule of law.

The Court's ability to identify textual sources that allow it to determine the scope and content of nonderogable rights in a transparent and principled manner (which in the hypothetical case posited above can readily be found in the Habeas Corpus Act, 1679) and its continued ability to trace the constitutional recognition of these principles back through confederation to the instruments of the early modern and medieval eras are essential to this task. Thankfully, a trail has been blazed by the jurists most familiar with these sources, and owing to this no one can dispute that these unwritten constitutional principles can be found in instruments that were part of the unwritten constitution of the United Kingdom as it existed at confederation. After the next chapter's examination of the efforts of British judges – particularly, Tom Bingham – the path to a credible and comprehensive account of the substantive principles of the rule of law and their scope and application will be clear.

In the age of transnational terrorism and the pressures it creates on governments to value security over nonderogable rights, the unwritten principles of the rule of law will likely serve as the final barrier, especially if the government persists in attempts to limit and derogate from Charter rights. At that point, it will be essential for courts to be able to point to the sources of law that contain the principles upon which it will rely, much as Chief Justice Lamer did in the *Provincial Judges Reference*, only with much more at stake and under considerably more pressure. For that to be possible, the courts will need to construct a clear and credible model of the substantive principles of Canada's rule of law – before the next major public order emergency. As will be demonstrated in the next chapter and the sections that follow, this is only possible if we can recover the understanding, techniques, and esteem for the history that gave life to the constitution.

2

Contemporary British Approaches to Unwritten Constitutional Principles

A single line imported into the system of that complex and indefinite aggregate called the British Constitution.

Edward Blake, on the Preamble of the British North America Act, 1867[1]

The Canadian judiciary is remarkably broad minded. When compared to analogous tribunals in North America, the Supreme Court of Canada has been far more likely to cite foreign law in its judgments; it turns frequently to other Commonwealth jurisdictions to examine their doctrine, even on matters of constitutional law. Members of the Canadian legal profession and constitutional scholars are not surprised when our courts look abroad for inspiration, and this is doubly true when the courts turn their attention to the reasons for the rulings from the benches of Britain's highest court. Formerly, its members were known as the lords of appeal in ordinary (commonly, the law lords), while today they are the justices of the Supreme Court of the United Kingdom.

Until 1949, those jurists also served as Canada's court of last resort; sitting as the Judicial Committee of the Privy Council, the law lords routinely and uncontroversially reviewed the decisions of the Supreme Court of Canada. For this reason, the Privy Council's vision of the Constitution of Canada bound the Canadian courts for decades and still exercises a decisive influence. One example is particularly instructive: the living tree doctrine, which remains the dominant ideal of Canadian constitutional interpretation, was planted in Canadian jurisprudence by Viscount Sankey; more specifically, it was found in his reasons for allowing an appeal against the judgment of the Supreme Court of Canada.[2] Accordingly, those who would supply the Canadian courts with useful approaches to the unwritten constitutional principles of the rule of law do so on very persuasive precedent. The high value that Canadian jurists

continue to place on British jurisprudence is serendipitous in this case, as British court judgments are particularly illuminating on the issues that concern this volume.

Needless to say, there is a long history in Britain of court judgments addressing the complexities of that nation's constitution. The unwritten constitution of the United Kingdom is comprised of a set of textual sources, but there is no index to its contents contained in any one constitutional instrument. Therefore it should not be surprising that the framers of Canada's Constitution Act, 1867 did not enumerate the sources of the unwritten constitution of the United Kingdom, despite explicitly guaranteeing the new nation a constitution similar to it in principle. This volume will demonstrate that there are good grounds for concluding that the Canadian courts can and should give effect to these absolute rights in a demonstrably consistent and objective manner, a manner that is, furthermore, consistent with the *Provincial Judges Reference* and Mark Carter's insights (discussed in chapter one). This chapter will shed light on how Canadian jurists might look to their British colleagues in general, and to Lord Bingham's judicial and scholarly writing on the constitution of the United Kingdom in particular, to better identify the sources and the modern scope of the unwritten constitutional principles of the Canadian constitution.

DICEY AND THE RULE OF LAW: THE TRANSITION FROM BLACKSTONE

Despite their general willingness to consult other jurisdictions, Canadian scholars and jurists have rarely turned to the judgments of the British courts in the twenty-first century when addressing the unwritten constitutional principles of the rule of law. When faced with that issue, Canadians too often fail to cast our eyes on recent developments across the Atlantic, towards the birthplace of the medieval and early modern constitutional statutes that have been interpreted in that country's courts for centuries. One explanation for that oversight is that we do not believe that this is necessary: instead of recent British jurisprudence, we have turned to Albert Venn Dicey.

Dicey assumed a central position as the chief expositor of the constitution of the United Kingdom shortly after confederation. He displaced William Blackstone, whose treatise was preeminent during the previous hundred years. Dicey's assumption of this posi-

tion marks the end of a tradition where legal history had pride of place: since Dicey's attempt to rationalize constitutional theory, it has been increasingly difficult to access the meaning of the rich and complex history that preceded him. His definition of the rule of law is seminal, but it also had the effect of drawing the focus of jurists and scholars to the question of under which conditions governmental power might be considered lawful, a subtle but decisive shift from an approach centred on rights common to the early modern era.

Dicey's definition of the rule of law is that:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government ... It means, again, equality before the law ... the "rule of law" in this sense excludes the idea of any exception from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ... the notion that ... affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts ... is utterly unknown to the law of England.

His definition has three elements. The rule of law forbids the exercise of arbitrary power, namely, the use of government power for malicious or inappropriate purposes as opposed to the public good; it subjects governmental officials to the law; it bars the government from setting up special courts to adjudicate claims involving claims against the government – including claims of misconduct – and from depriving the superior courts of their jurisdiction over those claims.

To understand how this shifts the focus of the rule of law from substantive rights to formal and procedural requirements, consider the definition of this paradigm of constitutional governance promulgated by the United Nations. In 2004, the Secretary-General (relying on an earlier report of the General Assembly) defined the rule of law as:

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally en-

forced and independently adjudicated, and which are consistent with international human rights norms and standards.[3]

The difference between these two definitions lies in the last clause of the second, which refers to standards for the laws themselves. As the next chapter will detail, international law contains minimum standards for national legislation: it cannot violate the most basic rights, which are nonderogable even during the most severe public emergencies. Dicey's conception of the rule of law, unlike that of Blackstone and earlier iterations, does not include this sort of standard for the laws themselves, containing no reference to the constitutional entrenchment of rights. In this way, it is the forerunner of "thin" definitions of the rule of law, which have been influential in analytic jurisprudence in the twentieth century, most notably through the work of Joseph Raz, who has criticized the "thick" conceptions of the rule of law promulgated by international organizations such as the United Nations and the International Commission of Jurists.[4]

A "thin" conception of the rule of law that does not include embedded and nonderogable rights can be criticized as being merely rule *by* law: if even the most fundamental restrictions on what the government cannot do to a citizen, such as torture, can be done away with as soon as a law authorizing it can be enacted, then the rule of law might be said to have been reduced to a set of procedural niceties. As will be detailed in the next chapter, international law moved decisively towards a "thick" concept of the rule of law in the wake of the Second World War and the Nuremberg prosecutions: without doing so, it would have been impossible to prosecute Nazi officials for war crimes against humanity: even when planning genocide these officials had observed all of the requirements of German law scrupulously. Merely following German laws that did not protect nonderogable rights common to civilized humanity was no defence.

As will be discussed in the next chapter, the rights entrenched as nonderogable in the international instruments promulgated in the wake of the Second World War are roughly congruous with the constitutional rights identified by Blackstone at the end of the early modern era. These definitions of the rule of law contain both a procedural and substantive dimension, the former being largely Diceyan while the latter is a reflection of a set of rights recognized as essential to the preservation of any constitutional order worthy

of a name in multiple epochs. However, as Dicey's thin definition of the rule of law remains the most commonly cited version in the judgments of the Canadian courts, it is the task of this volume to demonstrate that his vision of the rule of law was not identical to that of the framers at confederation. Once the anachronistic nature of projecting his theoretical framework into the Canadian constitution becomes clear, one can observe the absurdity of the argument that Diceyanism forecloses the juridical recognition of the substantive principles and absolute rights recognized by the preamble of the Constitution Act, 1867.

That said, given the enduring influence of Dicey on Canadian jurisprudence it is important to understand what motivated his adoption of a concept of the rule of law that was considerably *thinner* than the version which this volume will demonstrate was prevalent in Canada at confederation. This will also set the stage for the final chapter's discussion of why the historical approach to the identification of the substantive principles of the rule of law has not been a preoccupation of Canadian legal academics. As befits the general approach of this volume, this section will not engage in a detailed reconstruction of Dicey's approach to the rule of law and his disagreements with earlier approaches but will instead seek to explain how his views were influenced by his historical position. The examination of the tension between the concept of absolute rights and the Diceyan reconstruction of the rule of law as a concept of analytic jurisprudence will foreshadow the third part of this volume's historical explanation for the apparent antipathy of certain strands of positivist and postpositivist legal philosophy for the historical reconstruction of the substantive principles of the rule of law embedded into the Constitution of Canada.

By examining intellectual history, it is possible to understand why certain schools of analytic jurisprudence resist the recognition of the rights embedded by these substantive principles. As will be detailed in the third part of this volume, many of these schools exist within a lineage relationship that extends back to Hobbes, Francis Bacon, and Jean Bodin and forward to many prominent Canadian constitutional scholars of the twentieth century, such as John Willis. Dicey is the proper point of departure for this discussion because of his unique position within Canadian jurisprudence, even as British judges have moved beyond reliance on his definition of the rule of law as the solitary touchstone for this topic and as

prominent British scholars of analytic jurisprudence have likewise branched out in new directions.

British judges have recently relied upon theories of rights that they note are explicitly antithetical to Dicey's views. In *R (Jackson and Others) v. Attorney-General* (a case discussed in detail in the next chapter) Lord Steyn noted that the "classic account given by Dicey ... pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom,"[5] while the British legal theorist T.R.S. Allan has sought to "detach Dicey's formal definition of the rule of law (emphasizing formal equality before the law) from the 'spirit of legality' he sought to explain and celebrate."[6] Canadian jurists and scholars have much to learn about how their thinking on the rule of law can move beyond Dicey's formalism and in particular about why knowledge of history is essential to this task.

Allan has identified how Dicey attempted to draw a clear line between a historical approach to the constitution of the United Kingdom and his own analytical approach:

> In seeking to distinguish his role as a constitutional expounder from that of the legal historian or political theorist, however, Dicey plainly exaggerated the necessary analytical detachment ... Dicey's main purpose is to delineate a legal territory distinct from both legal history, reserved for historians, and political theory ... Dicey wants to confront and refute the possibility that so-called "constitutional law" is in reality a cross between history and custom which does not properly deserve the name of law at all.[7]

Allan notes that Dicey's "*Law of the Constitution* is not as methodologically consistent or coherent as his own exposition of his analytical method would seem to have required."[8] Dicey's treatise is patriotic in tone and appears to draw upon considerable historical knowledge: as Mark Walters observes, "The book's rhetorical form, its historical and comparative references, and its distinctively 'Whig' take on the constitution do not seem obviously analytical or positivist."[9] When we look beyond that rhetorical packaging, however, it becomes evident that relatively modern schools of thought animate Dicey's concept of the rule of law, which focused on the restraints on arbitrary power rather than the identification of absolute rights or what had earlier been considered natural or fundamental law. When Dicey wanted to establish the proposition

that absolute rights were not inherent to the constitutional order, he proceeded by relying on the fact that this was the position that Parliament had taken in the eighteenth century.[10]

Dicey's refusal to engage in serious historical reconstruction of events that were essential to both his conclusions about the non-existence of embedded rights and the normative foundations of the existing political order (of which he reflexively approved) demonstrate the existence of a considerable blind spot, one created by his inability to take legal history seriously. Instead, Dicey relied on a question-begging argument: Parliament has unlimited powers because it has successfully extended its own powers beyond existing limits, namely "the Septennial Act [which extended the term of the sitting Parliament in a manner that violated what many then believed was a constitutional requirement to hold elections every three years] is at once the result and standing proof of such Parliamentary Sovereignty."[11]

Relying on the proposition that in 1715 "an appeal to the electors, many of whom were Jacobites, might be perilous ... to the tranquility of the state," Dicey – making an argument that echoes Hobbes and later theorists who focus on sovereignty – concluded that "the statute was justified by statesmanship and expediency."[12] Despite promising a careful treatment of the Septennial Act, "the circumstances of its enactment and the nature of the Act itself merit[ing] therefore special attention,"[13] he did nothing of the sort.

Study of the historical circumstances of the writing of *The Law of the Constitution* reveals why Dicey did not believe it was necessary to delve deeper into the past and inquire as to whether it had always been the case that embedded and nonderogable rights were part of the rule of law in the United Kingdom; he was a nineteenth-century Whig. That is, he was an adherent to a political ideology that embraced a teleological vision of the constitutional order of the United Kingdom and its governance. Writing to Oliver Wendell Holmes, Dicey noted that he had been "brought up in a very good Whig circle, [in which] I had been from my youth perpetually, though unconsciously, educated."[14]

The most important element of nineteenth-century Whig ideology for present purposes is that the constitution of the United Kingdom had been continuously evolving toward perfection. In the storied words of the Whig historian Thomas Babington Macaulay – writing during Dicey's youth – "the history of our country during the last hundred and sixty years is eminently the history of

physical, moral, and intellectual improvement."[15] Furthermore, the Whigs of the eighteenth and nineteenth centuries believed that the constitution and government of the United Kingdom were the surest proof of this improvement. It was Dicey's firm belief, therefore, that the constitution of the United Kingdom as it then existed (as it evolved from the time of Magna Carta to the nineteenth century) established the best form of government that had ever been or ever could be. That constitution, he argued, allowed for legislation like the Septennial Act, a position that foreclosed certain positions on embedded rights.

This belief in the innate superiority of the constitutional order as he believed it existed in the late nineteenth century allowed Dicey to further conclude that nonderogable rights – even the right not to be killed – were unnecessary. As befitted a Whig, Dicey was perennially optimistic. Accordingly, he argued that while a "legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal," but this caused him no anxiety, as "legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it."[16] Dicey, being a Whig, could not conceive of a future in which the constitutional order might degenerate and such madness and idiocy might prevail (as progress was inexorable and atavisms unthinkable), but it is not difficult for those living in the present day to do so, as we know all too well that numerous individuals were sent to their deaths by a murderous twentieth-century regime that classified people into racial categories by means of pseudoscientific eye-colour charts.[17] Since the Second World War, it should be evident that Whig optimism was not a sufficient justification for abandoning the idea of nonderogable rights, but excessive reverence for Dicey can stand in the way of critical examination of the lacunae in his approach to the rule of law and how these might best be corrected.

Although Dicey's conceptual definition of the rule of law is frequently cited, it is but rarely applied in Canadian judgments. At this point, these citations now appear to be a genuflection towards an icon rather than serious engagement with his ideas. In any case, questions of optimism or of logical coherence aside, the goal of this volume is to demonstrate that there are approaches to the rule of law that can supplement the tradition represented by Dicey, which would appeal specifically to those jurists who wish to identify a textual basis for the principles of the Canadian rule of law and de-

velop a consistent and rational approach to its contemporary application.

As John Allison noted, "by claiming to distinguish and relegate the historical in his legal exposition of a current scheme of rules and principles as it then stood, he turned constitutional law to stand facing in the wrong direction, away from its constitutional path."[18] Historical reconstruction of the substantive principles of the rule of law as they existed at confederation represents the path not taken by those branches of legal philosophy that were decisively influenced by Diceyanism. By supplementing philosophically oriented definitions, this volume can serve to correct a persistent blind spot, which will allow for a stereoscopic view of the rule of law that presents a multidimensional perspective. This correction can only begin by turning our gaze on what the adoption of Dicey's vision obscured, in particular, the work of William Blackstone.

As courts returned in the twentieth century to the project of identifying a clear basis for the nonderogable rights that make the rule of law meaningful, they gradually turned away from exclusive reliance on Dicey, a trend that is particularly notable in the United Kingdom. Among preeminent British constitutional commentators, Vernon Bogdanor has gone so far as to say that "Dicey's constitutional analysis is now irrelevant";[19] while writing from the bench, Sir Stephen Sedley opined that "the content of rights needs to be freed from subordination to the Diceyan monolith."[20]

The judiciary of the United Kingdom has, as a consequence of this turn, rediscovered another approach to the principles of its unwritten constitution that comprise its rule of law. Bidden or unbidden, the appeal of an approach predicated on constitutional history – Blackstone's approach – is powerful; perhaps part of its appeal lies in the fact that this is the return of the repressed. The unconscious aversion to legal history of legal philosophers who adopted Dicey's approach can lead to a forgetting; however, those in search of lost time can still recover the importance of the vicissitudes of our history by considering how those events shaped our constitution for meaningful ends.

COKE, BLACKSTONE, AND THE BOOKS OF AUTHORITY

Whereas Dicey's treatise lies at a point of transition between an earlier and a more contemporary tradition, Blackstone's marks the

zenith of what had passed. Of course, this does not mean that it is *historically oriented* in the scientific sense that this term would have today; such an assertion would be anachronistic in the extreme. The legal scholars of the medieval and early modern eras disagreed on the meaning and purpose of the English constitution just as much if not more than contemporary scholars dispute the Canadian constitution of today. To provide only one pertinent example, which will be explored in the second third of this volume in detail: despite the fact they were contemporaries, Edward Coke and Francis Bacon's views could hardly be more different; Coke was a constitutionalist who championed the supremacy of the law over the king, while Bacon was the foremost advocate of an absolute royal prerogative that existed above the laws.

The treatises they wrote – Bacon's *The Elements of the Common Laws of England* (1630) and Coke's *Institutes of the Laws of England* (1628–44) – were both typical of the period in that they were not neutral restatements of the law but often advocated for a particular position, especially when they discussed sensitive issues like the boundaries of royal power. Crucially, Coke's *Institutes* were included in the exclusive set of texts known as the Books of Authority; Bacon's was not, owing to the positions the two writers took on the relative status of the king and the law during the constitutional crisis that defined their era.

It is a longstanding principle of English law that no textbook or treatise other than the Books of Authority can be cited by any court as an authoritative statement of the law of the land, much less its constitutional law. Only statutes and cases have that status; it is for this reason that the Books of Authority are truly exceptional. Accordingly, they were essential to the development of English law and not merely because their great influence is in inverse proportion to their small number. The fact that only a minuscule fraction of the scholarly writing on England's laws attained this status is a function of a nexus between their authors and the constitutional history of the erection of the rule of law. That history must await the second part of this volume, while the transmission down the ages of these two profoundly antagonistic sets of ideas about the issues of law and authority must be forestalled until the third. At this point, it is sufficient to note that Edward Coke is the defining example of a constitutionalist.

The only other scholar who approached Coke's position at the pinnacle of the constitutionalist pantheon authored the book of au-

thority that is most pertinent to this volume. William Blackstone did not attain his Olympian status by fighting for his vision of the constitution as Coke had done. Rather, he played Hermes to Coke's Apollo: if Coke was the oracle of the common law during the early modern era, Blackstone was the messenger of constitutionalism in an age of revolution, a herald recognized by Edmund Burke and his contemporaries at the dawn of the nineteenth century. His *Commentaries on the Laws of England* served as the capstone and seal of the complete set of the Books of Authority; none has been recognized since, but Blackstone's own list of these texts is considered authoritative.

Blackstone (the first university professor of English law) enumerated the Books of Authority, but he was by no means solely responsible for recognizing them. The process by which this canonical set of texts was established provides an example of the way that history and custom were central to authority all through the development of what became the constitution of the United Kingdom. As Blackstone noted, judges allowed the Books of Authority to be cited as precedent only after they had been widely recognized as essential and irreplaceable.

There are two reasons why a book might attain such status. Some of these volumes, particularly the oldest among them, memorialize principles of such great age that without recourse to the explanations in these texts, there is no way to understand how the courts had applied these principles in the past. One example is Ranulf de Glanvill's *Treatise on the Laws and Customs of the Kingdom of England*, which was written in 1189, before court records were kept; without this book, it would be impossible to understand how the embryonic right to trial by jury established in the Assize of Clarendon was applied.[21] As will be detailed in the next chapter, some of the other early treatises that were later recognized as Books of Authority shed light on the first principles of the emergent medieval rule of law. For instance, the principle of legality, or the idea that authority must be rooted in law, was first articulated in Bracton's *On the Laws and Customs of England* (c. 1260), which notes that "The king must not be under man but under God and under the law, because the law makes the king ... for there is no *rex* where will rules rather than lex."[22]

However, this was not the only justification provided by Blackstone for the use of Books of Authority. Were that the case, he would not be able to include on his list Sir Edward Coke's *Institutes*

of the Laws of England. This book, Blackstone argues, is worthy of such respect not because of its great age but because of Coke's great learning,[23] evident in Coke's understanding of the deeper meaning of the principles which he traced over the course of the centuries in order to convey them in his *Institutes*. As the next section will discuss in detail, Coke wrote at a time when the boundaries of the rule of law were taking on greater definition; his life and work was dedicated to that end. His erudite advocacy for principles of the rule of law that were later entrenched into the English constitution during the seventeenth century was the reason for the plaudits of many succeeding generations of lawyers.[24]

To put it another way, Coke's *Institutes* earned its place among the Books of Authority because Coke exercised more influence over the development of the rule of law in England than any other single jurist: his errors, it is said, *are* the common law. Nevertheless, his treatise was eclipsed by Blackstone's roughly a hundred years later. Blackstone's was preferred by later generations of lawyers, who praised – and relied upon – his comprehensive review of the earlier Books of Authority. This fact remains of particular importance to Canadians attempting to understand the unwritten constitution of the United Kingdom, since it was shortly before confederation that Blackstone enumerated the statutes that set out the rights that comprise the rule of law.

In the section of his *Commentaries* that treats on "[t]he absolute rights of every Englishman," Blackstone solidifies the consensus in existence since Coke's apotheosis: that these rights had not been created or granted. He explains that they were merely recognized in the statutes passed after the victories of the constitutionalists in successive constitutional crises: "[A]s soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger." From here Blackstone enumerates the six statutes in which the seven principles of the English rule of law and – through the preamble – of Canadian rule of law equally, were first memorialized. He names them as follows:

> First, by the great charter of liberties, which was obtained, sword in hand, from king John ... Afterwards by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law ... Then, after a long

> interval, by the petition of right ... Which was closely followed by the still more ample concessions made by [Charles I] to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the habeas corpus act, passed under Charles the Second. To these succeeded the bill of rights ... Lastly, these liberties we again asserted at the commencement of the present century, in the act of settlement.[25]

It requires some knowledge of the historical context of the legislation to identify the six, as statutes did not acquire official short titles until 1896. The official short titles of five of these acts (which use modern rather than the more familiar early modern dating conventions) are now the Magna Carta, 1297; the Petition of Right, 1627; the Habeas Corpus Act, 1679; the Bill of Rights, 1689; and the Act of Settlement, 1701. The sixth, which Blackstone refers to indirectly as "the still more ample concessions made" by Charles I, refers implicitly to one statute of constitutional significance that has no official short title: it is still referred to in the Statutes of the Realm as "An Act for the Regulating the Privy Council and for taking away the Court commonly called the Star Chamber." It is sometimes known as the Habeas Corpus Act, 1640, although it was more frequently referred to in the early modern era as the Act Abolishing the Star Chamber, 1640, so it is this second form that will be used in this volume.

Awareness of the importance of Blackstone's treatise at the time of confederation is the first step towards understanding the historical content of the specific protections embedded into both the constitution of England (which in 1707 became the constitution of the United Kingdom) and the Constitution of Canada. It is an awareness that can no longer be taken for granted, as Dicey's distinction between the constitutional exegesis and historical interpretation has resulted in a gradual decline in attention to legal history within the profession and the legal academy. This declining historical consciousness was exacerbated by three additional dynamics, which were of primary importance in the eighteenth, nineteenth, and twentieth centuries, respectively.

First, Blackstone's work quickly became authoritative, so much so that further treatises on the same topic would be of such limited use that they could not acquire the legal force of a Book of Authority. Second, the principles Blackstone elucidates so ably were the basis of rights that were considered well settled during

the nineteenth century, as this was one of the rare periods in the history of the United Kingdom when it did not experience a serious constitutional crisis. The third factor explains why the history of these principles was not a subject of serious study during the twentieth century, when these rights came under sustained pressure; by then, constitutional history was thought – initially, by Diceyans and neo-Diceyans – not to provide helpful insights into the scope, meaning, or importance of these principles, for reasons that must await the third part of this volume for full consideration.

This diminution of Blackstone's influence as a guide to constitutional history in Canada and the importance of constitutional history itself was uneven: the approach continued to loom large within the judiciary as compared to academia. The British judiciary was one of the last redoubts of constitutional history, which can be demonstrated by a consideration of the jurisprudence it has produced on the topic of the principles found in the constitutional statutes. An analysis of this jurisprudence also demonstrates that a keen understanding of constitutional history was integral to it.

THE MODERN BRITISH DOCTRINE OF CONSTITUTIONAL STATUTES REAFFIRMS BLACKSTONE'S ENUMERATION

As the constitution is indeed a living tree, it stands to reason that a modern historical approach to the principles of the rule of law cannot rely exclusively on eighteenth-century exegesis of its roots, even if it is drawn from a text that remains an authoritative source. That said, British jurists have demonstrated the continued utility of the *Commentaries*, by relying on its identification of the statutes that contain the principles of the rule of law. In the twentieth and twenty-first centuries, these are referred to as constitutional statutes or statutes of constitutional significance; this nomenclature is an implicit rejection of twentieth-century legal approaches based on Dicey's vision of the constitution, which spurned Blackstone's identification of a hierarchy within a set of statutes and, instead, theorized a horizontal structure of legislative acts. (In doing so, the British judiciary set itself against the neo-Diceyan views of theorists like R.F.V. Heuston.[26])

A return to great appreciation of legal history as a means of constitutional interpretation offers, then, a means of identifying the sources of foundational principles, but this is only one of the two key practical problems that judges must address when adjudicat-

ing claims that implicate the Canadian rule of law. Fortunately, the recent judgments and scholarly writings of British jurists also demonstrate how essential constitutional history can be to those who must determine the contemporary scope and application of the principles embedded by the constitutional statutes. Accordingly, these more recent sources should also be of particular interest to Canadian jurists who would seek to follow and extend the path set out in Chief Justice Lamer's reasons in the *Provincial Judges Reference*. If Canadian jurists seek a demonstration of the importance of the constitutional history that is quickly fading in importance within our legal culture, there is no better example to examine than this jurisprudence, in particular the judicial and scholarly work of Tom Bingham.

Recent British jurisprudence demonstrates how the identification and application of the principles of the rule of law can be built upon an unimpeachable textual foundation. Additionally, this exemplary use of solid and convincing references to the relevant historical context when defining the scope and application of these principles in a twenty-first-century context can be considered to constitute a credible argument that Canadian courts doing the same are interpreting – not creating – Canada's rule of law. For this reason, the renewed judicial application of historical approaches to the constitution of the United Kingdom deserve serious scrutiny from both sides of the Atlantic.

Blackstone's enumeration of the constitutional statutes is not cited in modern court cases; this list is either taken for granted – not surprising, given that Blackstone's has been considered the most important of the Books of Authority for centuries – or forgotten. Modern cases demonstrate that this list is still accurate; they also explain why the list is not simply arbitrary but a reflection of a special status that these statutes deserve owing to the function that they have long served in maintaining the constitutional order of the United Kingdom and its rule of law. Furthermore, they demonstrate the rejection of twentieth-century theories of that nation's constitution. Dicey (and the neo-Diceyans of both the orthodox and manner and form schools of sovereignty) have insisted that every statute must be of equal force,[27] as they all purportedly derive their force and effect from the same source: a sovereign Parliament. This insistence on the nonhierarchical ordering of legislation has displaced the established view – which had prevailed from Bracton's time to Blackstone's – that the constitutional statutes

were to be distinguished from other legislation in their recognition of the necessary features of a constitutional order: features that have binding legal force in and of themselves. As the second part of this volume will show, this approach justified the constitutionalists' position during the crises that ended with the execution of one monarch and the expulsion of another, as the constitutional statutes that memorialized these principles only entered into the law after they were enacted in the wake of these turbulent times.

When it reaffirms the view that constitutional statutes are a distinct set of instruments that retain a special legal status, the judiciary of the United Kingdom rejects the doctrine derived from Dicey that "a constitutional statute has no greater status than a 'Dog Act'" (viz., a leash law).[28] Lord Laws struck the first decisive blow against that view in 2003 when deciding *Thoburn v. Sunderland City Council*, commonly known as the *Metric Martyrs* case.[29] The judgment addressed the content of the unwritten constitution and the special status of constitutional statutes. Laws began with the obvious, which he believed required no authority: "The special status of the constitutional statutes follows the special status of constitutional rights. Examples are the *Magna Carta*, the *Bill of Rights, 1689*."[30] Between 2003 and the present day, the British courts have continued to assert that this is a well-defined set of statutes, and they have also stressed the importance of these instruments to the rule of law.

In 2014, the Supreme Court of the United Kingdom explicitly adopted a historical approach to the identification of the principles of the rule of law in the constitution of the United Kingdom that Laws had outlined in *Thoburn*. In *R. v. Secretary of State for Transport* (more commonly known as the HS2 case) the court considered the scope of the principle that parliamentarians cannot be prosecuted for what they do in the course of their duties, found in article 9 of the *Bill of Rights*. The judgment discussed the relationship between these principles, the constitutional statutes, and the rule of law. Adopting *Tho-burn's* enumeration, it noted: "The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701."[31]

The Supreme Court of the United Kingdom also made explicit reference to constitutional history in this judgment when it addressed the question of the importance of parliamentary privilege:

"Article 9 of the Bill of Rights [is] one of the pillars of constitutional settlement which established the rule of law in England in the 17th century."[32] If a reader is familiar with Blackstone's *Commentaries*, the significance of this sentence will be clear: the judgment reaffirms that the features of the rule of law are not abstract ideals that take shape in the justices' hands. If the judiciary understands these principles to be the result of a historical process in which a crisis led to a particular constitutional settlement that established a legal order that depends upon those principles, then it will recognize that the historical context and motivation for the enactment of those principles are relevant to the question of what the rights they created protect today. These judgments demonstrate that the substantive principles of Canadian rule of law first took form in this set of readily identifiable texts because of particular abuses that were then proscribed in order to establish and maintain the supremacy of the laws, the history of the attempts to subvert those principles will also be of great value when considering the scope of their contemporary application, especially in cases where governments engage in the similar types of abuses.

The Supreme Court of the United Kingdom's approach to the Bill of Rights, 1689 in HS2 is very similar to the one taken by the Supreme Court of Canada in the *Provincial Judges Reference*. The insight that HS2 adds – that the statutes where the principles of the rule of law are found were part of a constitutional settlement that established and maintained that same rule of law – might serve as the starting point for the reconstruction of the historical foundations of the Canadian rule of law. However, while this aspect of the judgment in HS2 has received some scholarly attention on this side of the Atlantic,[33] it is unlikely that it will lead to positive developments at the Supreme Court of Canada unless and until the court is presented with a case that requires fruitful use of this doctrine. Moreover, even should that happen, recognition that the historical context of the enactment of the constitutional statute at issue is critical to its interpretation will not yield that fruit unless Canadian jurists can be made confident in their ability to make arguments grounded in their understanding of that history.

Most Canadian lawyers and judges do not possess the detailed knowledge of the constitutional history of England that is necessary to understand the purposes behind the embedding of the substantive principles of the rule of law. With each passing generation, this knowledge appears more esoteric and less important to our

understanding of our constitution, and accordingly our connection to the tradition in which the legal profession and the courts serve as guardians of the rule of law becomes more tenuous. Attaining the easy familiarity with this history displayed by jurists like Lord Bingham is not an easy task. Unlike Bingham, most justices in earlier generations simply assumed that their historical references would be understood by a legal audience, as the constitutional history of England was once central to the self-understanding of the legal profession and its pedagogy. The purpose of this book is to highlight how useful and practical this constitutional history can be to practising lawyers and judges in the twenty-first century. This begins with a review of the jurisprudence of the United Kingdom, where jurists like Bingham have made masterful use of their understanding of the historical context of the emergence of the principles of the rule of law. What is also required, however, is a consideration of the sort of information that will be useful to Canadians and the ways in which this information may be helpful to those concerned with the questions about the scope of unwritten constitutional principles as they present themselves in this country.

THE SCOPE OF THE PRINCIPLES PROTECTED BY PRE-CONFEDERATION STATUTES REQUIRES ATTENTION

Cases such as *The Queen v. Lindsay* (which was decided in 2003) demonstrate that the Canadian courts have rejected attempts to oversimplify this task of construing the scope of the substantive principles embedded in what British jurists call the constitutional statutes. In that case, David-Kevin Lindsay appealed his conviction for driving without insurance, without registration, and without a licence plate. He argued that the provisions of the British Columbia Offence Act that created an appeals procedure that required him to pay for a transcript were contrary to Magna Carta. His argument was predicated on section 40 of Magna Carta,[34] which he translated as: "To no one will we sell, to no one deny or delay right of justice." In his view, a straightforward application of this section would lead to a judgment barring the province from charging him for the trial transcripts that he needed for his appeal of these violations of the Motor Vehicle Act.

The judgment that decided his case concluded that Magna Carta was not an instrument of constitutional significance in Canada.

This is undoubtedly correct: if all the provisions of a thirteenth-century instrument were held to be legally binding in the present day, then patently absurd results would follow, especially in a country that did not exist during the era of its enactment (and where the location of which might have been covered with an admonition to avoid it, for fear of encountering dragons). *Lindsay* demonstrates why we must remember that the Canadian rule of law is comprised of unwritten constitutional principles found in the constitutional statutes, rather than being comprised of the instruments that memorialize those principles in their entirety. Accordingly, when the same provision of Magna Carta at issue in *Lindsey* was brought before the Supreme Court of Canada in *R. v. Rahey*,[35] Justice La Forest zeroed in on the principle that this section of the Magna Carta protects. That said, in that case the issue of the Great Charter's scope was not decided, as detailing the unwritten constitutional principles is unnecessary where the Charter prohibits what is challenged.

Both *Lindsay* and *Rahey* implicitly demonstrate that neither identifying the precise unwritten constitutional principle found in those ancient statutes of constitutional significance nor determining their proper scope of application in the twenty-first century is straightforward. The difficulties are made greater than they might be, however, by the fact that there is very little guidance in Canadian court judgments on the unwritten constitutional principles of the rule of law, for the reason that arguments that appeal to them can normally be disposed of by reference to the Charter. That is not the case in the United Kingdom, where the judicial culture and appreciation of constitutional history has been shaped by the fact that the nation has no modern Bill of Rights.[36] Accordingly, there is a considerable body of jurisprudence on the recognition of unwritten constitutional principles and their scope in the United Kingdom. This body of jurisprudence has the potential to be very helpful to Canadian courts addressing the statutes of constitutional significance embedded by the preamble, which contain unwritten constitutional principles that protect seven nonderogable rights.

While these cases frequently relate to the constitutional principles created very recently by the grant of devolved government to Scotland, Northern Ireland, and Wales, they nevertheless provide guidance on how Canadian courts might make well-formulated arguments about the historical context of the principles they contain

and might thereby provide a template for Canadian judgments seeking to address the scope of the principles found in the statutes of constitutional significance that existed at confederation. In such a template the Canadian judiciary might find the assurance to accept the preamble's invitation and enter into a full analysis and interpretation of these statutes.

INTERPRETING THE SCOPE AND APPLICATION OF A NEWLY IDENTIFIED CONSTITUTIONAL PRINCIPLE

After Lord Laws's historical exegesis of the statutes of constitutional significance in *Metric Martyrs*, a number of judgments from the highest courts of the United Kingdom elaborated upon it in quick succession and demonstrated how a historical approach to determining the scope of the principles contained in the constitutional statutes could be given effect when jurists possessed the confidence to draw upon their understanding of their context. One of the first of these was *Jackson v. Attorney-General*, which came before Tom Bingham and his colleagues.[37]

Jackson was a constitutional challenge to the Hunting Act, 2004, which banned the use of foxhounds. The Hunting Act had run into serious problems in the House of Lords, which has a similar function to the Senate of Canada; its obstruction came as no surprise, as this was the safest place in the nation to argue that a ban on fox hunts was ill conceived. The lords insisted on amendments that the House of Commons would not consider. As the two Houses of Parliament could not agree on the terms of the legislation by the end of the parliamentary year, the Speaker of the House of Commons passed the House of Commons' version of the bill over the objections of the House of Lords, using the provisions of the Parliament Act, 1911 to override the upper chamber. This was only the seventh time this procedure had been deployed in almost a century.

The most detailed analysis of the constitutional issues presented by *Jackson* is found in the reasons of Lord Bingham, who devoted forty paragraphs of very careful analysis to resolving them.[38] His reasons are particularly convincing because of his fine-grained historical analysis of the context for the Parliament Act, 1911. Bingham's reasons also implicitly demonstrate his understanding of the problem that has restricted the development of the jurisprudence of unwritten constitutional principles in both the United Kingdom and Canada, namely the anxiety that courts will be seen to be

inventing constitutional principles rather than discovering them. That fear appears to be more acute when the courts build their reasons from first principles – that is, by intuiting what legal philosophy holds these principles should protect – compared to using a historical approach to determine why a provision to protect the rule of law was given a particular form by its framers.

The cautious and historically oriented approach to unwritten constitutional principles that Bingham inaugurated in *Jackson* has proven especially useful in cases that hinged on the recent constitutional developments in the United Kingdom. Bingham's reasons in *Jackson* were written shortly after the United Kingdom completed a process of devolution, in which substantial powers were given to new institutions in response to increasingly powerful national movements seeking – at minimum – more "regional autonomy and democratic governance."[39] In 1998, the Parliament of the United Kingdom passed the Scotland Act, the Northern Ireland Act, and the Government of Wales Act, which created the Scottish Parliament, the Northern Ireland Assembly, and the National Assembly for Wales, respectively.

The Parliament of the United Kingdom retains the power to amend these legislative instruments, without resorting to an amending formula like Canada's. However, "as Lord Bingham put it, in his reasons in *Secretary of State for Northern Ireland*, the Northern Ireland Act, 1998 'is in effect a constitution'";[40] the court recognized the constitutional status of sections of that statute and by extension the other devolution legislation.[41] These Acts contain "constitutional principles of devolved decision making which Parliament is constitutionally bound to respect," although the scope and effect of these principles have been repeatedly disputed in the courts of the United Kingdom, giving its judiciary thorny and politically complex issues to resolve.

Of the three regional assemblies, the Scottish Parliament is the most powerful. This is a reflection of the fact that Scotland entered voluntarily into the legislative union that created the United Kingdom; in doing so, it preserved the exclusive jurisdiction of its own courts in certain matters[42] and retained other institutions that predate the Act of Union, 1707. Accordingly, the Scotland Act was recognized by the Supreme Court of the United Kingdom as a constitutional statute, owing to the "fundamental constitutional nature of the settlement that was achieved" with its enactment.[43] The parallels to the statutes that memorialized the constitutional

settlement after the Glorious Revolution, including the Act of Settlement, 1701 discussed in the *Provincial Judges Reference*, are obvious. So too are the parallels to cases such as the *Secession Reference*.

The similarity between these issues and those which must be decided by the Canadian judiciary are not superficial, although decisions adjudicating the constitutionality of the rights of Canadian (sub)national entities can be rather more thorny. In 1998, the Supreme Court of Canada was asked to address whether Canada's constitution would allow Quebec to unilaterally secede from Canada. Like Scotland, Quebec, a founding nation of the Canadian state, possesses a different legal system from the rest of the country; it also maintains political institutions with jurisdictions that are protected from federal interference. These features were preserved by the bargain negotiated at confederation.[44]

Owing to these characteristics, the constitutional relationships between Canada and Quebec resemble those between the United Kingdom and Scotland in some ways and those between the United Kingdom and Northern Ireland in others. While the unanimous reasons of the Lamer Court in the *Secession Reference* catalyzed a broad jurisprudential consensus, this is no guarantee that future attempts would prove as successful.[45] This is another reason for Canadian courts to take heed of Bingham's cautious and credible approach to determining the scope of unwritten constitutional principles, which is just as useful when addressing the principles of the rule of law – as in *Provincial Judges Reference* – as it is in addressing the principles of respect for constitutional relationships discussed in the *Secession Reference*. Bingham's reasons in cases addressing the devolution legislation serve as a model for both types of judgments.

At a time of great tension between political communities, Bingham noted in *Robinson v. Secretary of State (Northern Ireland)* that "provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."[46] The principle at issue was the "democratic principle," which allows citizens to resolve political impasses through elections. The scope given to the principle by the law lords would determine whether a challenge to the election of the Northern Ireland executive would succeed.

The Democratic Unionist Party (or "DUP," the most sectarian Loyalist party) had long opposed the participation of Sinn Féin (the leading Nationalist party) in governance. In order to prevent the election of an executive, the DUP refused to support a slate for first minister and deputy first minister that was backed by the other parties and that crossed the political spectrum. The impasse was then resolved through a vote of the Northern Ireland Assembly. Peter Robinson, a DUP assemblyman representing Belfast East, then brought a court challenge to the formation of the executive. He alleged that the election of the executive was unlawful under the terms of the Northern Ireland Act, 1998, as the six-week limit for its formation after the legislative elections had passed, owing to lengthy and delicate coalition talks. In order to determine whether the expiry of the six-week limit rendered the election of the executive invalid, it was necessary to interpret the Act, which is in effect a constitution. Its provisions were silent on the effect of that expiry,[47] but Robinson argued that an unwritten constitutional principle meant that in that event, a new general election to the Legislative Assembly was required.

Bingham concluded that the scope of an unwritten constitutional principle standing behind but giving meaning to the written terms of the act could only be determined through an assessment of the historical context in which the act was passed and the purposes that it was meant to serve. Lord Hoffmann agreed, noting that this constitution was "framed to create a continuing form of government against the history of the territory and the principles agreed in Belfast,"[48] which formed the basis for the cross-community compromise that made the Good Friday Agreement possible. Like the unwritten constitutional principles of the rule of law, the democratic principle had been instantiated in the Northern Ireland Act in order to solve a crisis that had existed in Northern Ireland since the Irish War of Independence.

While Robinson argued that the democratic principle meant that the expiry of the six-week limit should be interpreted to require "the vote of the people in free elections," Bingham concluded that in this context and owing to the intentions of framers to resolve a crisis, the democratic principle could not be interpreted so broadly. Accordingly, the judgment in *Robinson v. Secretary of State (Northern Ireland)* is properly characterized as a ruling in which Bingham conducted a careful analysis of a constitutional statute's historical context when determining the scope of the unwritten

constitutional principles that it recognizes. This led to the recognition of a principle with a narrow scope, which was integral to judicious and persuasive reasons. Such an outcome protects the credibility of the judiciary when it resolves complex and politically contentious questions like those presented in *Robinson*. As the Canadian courts are increasingly charged with deciding cases that either have similar features or are otherwise controversial, it might be prudent to engage with Bingham's ideas. Bingham's judgments are signposts on the route to judicial recognition of the seven absolute rights of the Canadian rule of law; the next way-point for those interested in the reconstruction of its historical foundations to that end is his remarkable treatise on the subject.

BINGHAM ON THE SCOPE OF THE UNWRITTEN CONSTITUTIONAL PRINCIPLES OF THE RULE OF LAW

The Rule of Law was published only weeks after Bingham's death, as he wrote it after he was diagnosed with cancer. It serves as the intellectual capstone on a career that saw him appointed lord chief justice of England and Wales and senior law lord; Bingham would have been the inaugural president of the Supreme Court of the United Kingdom had he not reached the mandatory retirement age the year previous to its creation.[49]

Bingham begins his treatise by discussing the nature of the principles that together form the United Kingdom's rule of law. As has become *de rigeur*, he invokes Dicey's classic formulation of the concept of the rule of law before turning to an examination of the historical origin of the principles that comprise it. Displaying his keen sense of history, Bingham credits Dicey not as the originator of the concept of the rule of law but rather as an academic popularizer, the one who catalyzed widespread discussion of the United Kingdom's constitutional order. He also notes that Justice Blackburn, who later became the first law lord, discussed the rule of law in his reasons shortly before confederation – that is, roughly twenty years before Dicey wrote his treatise.[50] And he notes that Blackburn's discussion referred to a principle that had been recognized by Coke,[51] although in truth, its history extends back to the medieval era.

The preliminary task of Bingham's treatise is to demonstrate the worthiness of his subject in an era in which a *thick* conceptualization of the rule of law has been subjected to sustained academic criticism.[52] However, Bingham argues that numerous well-founded

objections can be made to this skepticism; he notes that the rule of law remains meaningful to the United Kingdom's judges and legislators, who make use of it when deciding cases and when noting that new constitutional instruments are presumed not to conflict with its principles.[53]

His most compelling response to the critics of the rule of law comes largely in the form of a demonstration of how clear principles can be distilled from the constitutional statutes when they are viewed in their historical context. This is foreshadowed by his attention to the work of Judith Shklar. On the first page of Shklar's seminal essay on the topic, which Bingham cites in the introduction to *The Rule of Law*, she notes that "contemporary theories fail because they have lost a sense of what the political objectives of the ideal of the rule of law originally were and have come up with no plausible restatement."[54] Bingham's implicit response is to present a stereoscopic vision of the rule of law, in which theory and history are brought together to put all of the concept's dimensions into perspective.

While he does not say so explicitly, it appears likely that it is Bingham's agreement with Shklar that motivates his decision to begin his analysis with the "important historical milestones on the way to the rule of law as we know it today," an account that starts with Magna Carta. After this discussion, Bingham turns to the principles that he believes these milestones embedded within the unwritten constitution of the United Kingdom. It highlights the fact that the rule of law is a concept that developed through time; this fact allows us to remember that the rule of law's principles were developed in specific times and for particular purposes but were intended by its framers to be enduring. Only by attending to this context can we grasp the full content of the substantive principles of the rule of law and the scope of the seven absolute rights they embed. Bingham, quoting Shklar, warns us that if this meaning is not recovered, the rule of law risks becoming "just another one of those self-congratulatory rhetorical devices."[55]

Bingham's introduction to his historical survey of this process of constitutional development also indicates that he had an overriding purpose in mind when writing *The Rule of Law* – to preserve it. He describes what is at stake were it to be lost, with reference to non-derogable rights:

> The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance … confession extracted by torture … The list is endless.[56]

Bingham argued that the rule of law is substantive: it protects people against the particular wrongs that are routinely allowed in the evil regime that he describes, namely involuntary disappearance, torture, and assassination. It does not merely mandate that the government file the correct paperwork before doing so. Bingham's approach to identifying and defining the scope of the principles embedded by the constitutional statutes that existed before confederation can, therefore, prepare the path for the Canadian judiciary, in the event that they are called upon to affirm any of the seven absolute rights that are essential to the preservation of our rule of law. The yeoman's work that must be done to that end consists of surveying the historical context of each of these statutes.

PART TWO

How the Canadian Rule of Law Grew: Up from Its Roots

ENGLISH CONSTITUTIONAL HISTORY FOR CANADIANS: PRINCIPLES AND PITFALLS

Part two sets out the history that led to each constitutional statute in detail; its three chapters discuss the relevant principles specified in the statutes of each of three distinct eras in turn. A detailed examination of the constitutional crises of each era is essential to understanding the contemporary scope of any unwritten constitutional principle, an essential precondition for formulating arguments about how a given principle should be applied by Canadian courts in the twenty-first century.

Any analysis of the crises that catalyzed the constitutional developments of the medieval and early modern eras must not fall victim to that most dangerous fallacy: what Herbert Butterfield called the Whig interpretation of history or, as it is sometimes described, presentism.[1] The simplest way to avoid this error is to remember that the historical actors of previous centuries had no stake in what happened in later epochs, much less in playing a part in establishing the constitutional order that currently prevails: the barons at Runnymede did not intend to lay the foundation for Robert Baldwin and Louis-Hippolyte LaFontaine's struggle for responsible government in Canada. That said, in steering clear of Scylla we must not fall into Charybdis: when avoiding presentism we need also be mindful to avoid another error known as the *historian's fallacy* – the assumption that historical figures think and feel as we do today.

The typical manifestation of this error in legal history is the failure to recognize that before the late nineteenth century, jurists' orientation to the earlier phases of constitutional history was considerably closer and more attentive than modern lawyers can imagine. While medieval lawyers did not foresee the flowering of

a constitutionalist approach to law and authority, early modern jurists sincerely believed that they were part of that tradition; their fidelity to earlier phases of constitutional history was a point of honour. This perspective prevailed until quite recently, as will be discussed in the third part of this volume. In short, before confederation, no generation of lawyers thought they were setting the stage for the next phase of constitutional development, but until the twentieth century, jurists had always understood that they stood on a foundation that had been constructed by their forebears: to them, history – not experience, and certainly not utility or pragmatism – was the life of the law. If the Constitution Act, 1867 is taken seriously, we must understand why its framers embedded within it the principles that created the rule of law; for constitutionalists from the Middle Ages until the mid-nineteenth century, the answer was always found in their relation of the constitutional statutes to their constitutional history, to which they frequently turned when resolving questions about their meaning.

3

The Middle Ages and the First Constitutional Statutes: Royal Authority, Law, and Process

> The elements of constitutionalism lie scattered among works … For the period at issue here belongs … to a continuous tradition of western thought traceable perhaps to the fourteenth century or perhaps to the twelfth or even beyond. In the forging of that tradition debates over the "proper limits of lawfully constituted authority" were formative on the conceptual vocabulary of political discourse.[1]
>
> Howell Lloyd

The backdrop of Magna Carta provides conventional staging for a discussion of the constitutional history of the United Kingdom; following Bingham's approach in *The Rule of Law*, this volume will begin there. The approach this chapter will take, however, differs from Bingham insofar as this volume's larger purpose differs from his: this chapter details the history of Magna Carta as a guide to the interpretation of the principles of the Canadian rule of law. Accordingly, this chapter will facilitate answers to the question of Magna Carta's contemporary scope and application. This chapter must also be mindful that it cannot assume that Canadians have the same level of knowledge of English constitutional history as Bingham's English readers, as in Canada this phase of constitutional development is less likely to be considered part of the nation's history. Accordingly, it must discuss the context of Magna Carta in more detail. Before launching into the vast sea of constitutional history, we must chart the course for our explorations, so that we arrive at our destination without being overwhelmed *en route*. We must bear in mind that we want to rediscover the historical context of the substantive principles of the rule of law so that we can remember why the rights they protect are so important and require durable protection against derogation.

Tom Bingham warned that "*Magna Carta* ... has given rise to much bad history ... it did not embody the principles of jury trial ... or habeas corpus ... it would, moreover[,] be a travesty of history to regard the barons who confronted King John at Runnymede as altruistic liberals seeking to make the world a better place."[2] However, a detailed historical reconstruction of the Magna Carta does demonstrate that its principles embed an essential right that has a clearly definable contemporary scope and application. However, before discussing the Great Charter, we should recall how the principles that it contains came to be part of the Canadian constitution. Accordingly, this chapter begins by working backwards to the Magna Carta from the constitutional instruments with which every lawyer is familiar. The remainder of this second part of the volume will unfold chronologically, ending at confederation.

Enacted in 1982, the Charter notes that "Canada is founded upon principles that recognize the supremacy of God and the rule of law" (its only explicit reference to that principle) and notes further that "the guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." With these statements the Charter indicates that the principles of the rule of law and the rights it creates must be found in earlier constitutional instruments. In this way the Charter points us back to the only other Canadian source of constitutional (rather than quasi-constitutional) rights that existed prior to 1982, namely the Constitution Act, 1867: a document that *also* does not enumerate these rights but merely guarantees a "constitution similar in principle to that of the United Kingdom," without detailing the principles of that nation's constitution.

The framers of the Canadian constitution had a considerably better grasp of the constitutional history of the United Kingdom than most Canadian jurists have today. This is understandable, as the Fathers of Confederation believed that this history was the only way to make sense of that constitution. As that approach is no longer dominant and legal history no longer seen as providing the only basis for constitutional interpretation, the interpretation of the principles of the constitution of the United Kingdom has presented particular difficulties for Canadian lawyers and judges.

As the scholarly reaction to the *Provincial Judges Reference* demonstrated, it is difficult for Canadian judges to recognize the specific protections provided by the unwritten constitutional protections

of the rule of law unless they can credibly point to the existence of textual sources for those principles. However, as the first two chapters of this volume show, recent British jurisprudence addressing constitutional principles demonstrates that it is possible both to identify these principles and to construct principled and credible arguments about their proper present-day scope and application, at least when the jurists are exceptionally well versed in the constitutional history that illuminates these textual sources.

Chief Justice Lamer may not have thought it was necessary to explain the background of the Act of Settlement, 1701, as the history of the Glorious Revolution has traditionally been considered to be the explanation for the constitutional settlement that created a constitutional monarchy that remains largely in place today. The learning that is required to bridge the gap between our time and 1689 is less common now, however, and the juridical problem of extracting the substantive principles from a constitutional statute can be considerably more difficult when that statute predates the Act of Settlement by almost five hundred years.

Canadians' loss of familiarity with the medieval history of Magna Carta – other than its broadest strokes – is lamentable. Unfortunately, if the only people arguing about the meaning of Magna Carta in courts (as opposed to in academic literature) are self-represented litigants who (as discussed in chapter two) believe that it specifically prohibits charging fees for court transcripts, it is inevitable that jurists will begin to view it with suspicion. Through neglect and abuse, then, this instrument has become familiar to most working judges in Canada as a hobbyhorse ridden only by the eccentric and the vexatious.

Yet it may be precisely because its protections were so well embedded in our constitutional order, such that any violation would be practically unthinkable, that it has become possible for an instrument of this magnitude to degenerate in the popular imagination to this state. Right from confederation, its principles and the rights they create were no more noticeable than the air that we breathe. Unfortunately, just as we lost the understanding of the importance of its protections, new winds began to blow. Now that the laws that protect Magna Carta are being cut down, it is unclear whether the rule of law might yet stand upright.

MAGNA CARTA: SOURCE OF THE IDEAL OF LEGALITY AND OF THE FIRST CONSTITUTIONAL PRINCIPLE

The Great Charter is not merely the beginning of a tradition in which the ideal of legality would evolve, in which the zone of arbitrary authority would be constricted. Rather, it constitutes the first of many pieces of legislation that recognized that ideals were not sufficient: owing to the techniques that the most powerful actors employed routinely to evade attempts to impose legal limits on their authority, clear and absolute rights against particular forms of abuse were recognized as necessary to the survival of constitutional governance. As these techniques have proven themselves perennial over a millennium of constitutional history, we are not doomed to repeat the failures that ensued when these principles and the absolute rights they create came under sustained pressure.

The specific protection that Magna Carta provides is now essential. It is the only constitutional statute implicitly recognized by the preamble that protects against the extrajudicial killing of a nation's own citizens, now a frightening reality in Canada as elsewhere. The United States is not the only country that has revived this practice, despite its being incompatible with the rule of law's most fundamental prohibition; the United Kingdom and Canada participated in drone strikes targeting their own citizens in 2015.[3] This appears to be directly contrary to a section of the most celebrated clause of the Great Charter, which the British Library translates as "nor will we proceed with force against him, or send others to do so." These words of prohibition were "aimed at the use of brute force" by the king.[4] The key evidence that the Great Charter was aimed at preventing the king from using brute force against his subjects was John's proposal to his barons in 1215 (during the negotiations over Magna Carta that followed the capture of London) that "he would not go against them by force of arms."[5]

That said, in order to understand how Magna Carta served to instantiate both the general principle of legality and the specific principle of the rule of law prohibiting extrajudicial killing, we must have a detailed understanding of the historical context of its enactment, of each instance of its reenactment, and, indeed, of its subsequent clarification in the Six Statutes of Due Process. This extensive review is the only way to illuminate Magna Carta's dry Latin phrases, such that we may appreciate its significance not merely as a symbol of liberty but as an instrument that may be invoked today because it contains an unwritten constitutional principle that creates a legal right that governments are bound to respect.

The background to Magna Carta makes clear why it served as an instantiation of the general principle of legality: Norman-Angevin ideas of kingship and the acceptable limits of royal *ira et malevolentia* (wrath and spite) explain why the first steps towards the rule of law (which Magna Carta represents) were even necessary. As early as 1215, the proponents of medieval constitutionalism recognized that even if the most powerful political actors accepted the idea of legal limits on their authority in theory, this recognition was worthless if they remained free to engage in particular practices that made it impossible to hold them legally accountable. Specifically, the ban on extrajudicial assassinations was defined in response to King John's decisions in 1203 to send William de Braose to kill Arthur of Brittany and other rivals, a practice that recapitulated his father's scandalous assassination in 1170 of Thomas Becket, Archbishop of Canterbury.

Britain, despite being an island, was not a world unto itself during the Middle Ages. That much is clear from the transformation of Guillaume le Bâtard, duc de Normandie, into William the Conqueror, King of England. In some ways the Norman Conquest is a natural place to begin a discussion of the historical context that illuminates the Great Charter, since it was the powerful Norman King, Henry II, who created the constitutional crisis that led to Magna Carta. At the same time, however, this approach presents difficulties, as it breaches the barrier to a time about which the jurists of the Late Middle Ages thought inaccessible: we are now discussing a *time out of mind*.

In law, the name of this threshold is an important term of art, which has a special meaning within the English legal profession. Time out of mind – or time immemorial – refers to a point beyond which legal authorities believed it was impossible to speak with certainty: it is "beyond ancient memory or record."[6] The Statute of Westminster, 1275, fixed the limit beyond which the sources of laws and customs were deemed lost to the mists of time: it was 6 July 1189. Recognizing the significance of that date is the first step towards understanding the historical context of Magna Carta.

The date of 6 July 1189 marked the accession of Richard the Lion-heart but, more importantly, it marked an end to another reign: that of his father King Henry II, who had set up a system of law that would slip out of his heirs' control. Henry's formative attempts were marked by a tension between the legal limits he sought to place on his subjects and the arbitrariness of his theory

of kingship, which was already out of step with the theory of medieval constitutionalism being developed by jurists connected to the Papacy.

While thirteenth-century jurists set the end of Henry's life as the threshold beyond which they would cease to look for legal sources, then, it is precisely because his reign was the fitful transition from one age to another that it must be examined here. Henry's reign inaugurated the changes that created the tension in theory and turmoil in practice; this is the context in which Magna Carta must be seen. While the vision of the common law that Henry transplanted from Normandy to England created greater efficiency in administration and taxation, his extension of royal power provoked a backlash, and the internal logic of this new system of law provided the first elements of constitutionalism as a tool of resistance to the Norman and Angevin monarchs' arbitrary rule. This is the seedbed of Magna Carta.

HENRY II & THE TWELFTH-CENTURY RENAISSANCE: THE POWER OF LAW AND THE DANGER OF POLITICS

Henry II's reign gives us a window into the tumult of the twelfth century, along with a view of the emergence of the methods of governance and administration that would create a cohesive medieval polity out of a newly conquered state. Henry came to the throne in 1154 after an eighteen-year civil war that had devastated England. This period was later labelled "the Anarchy" because the constant fighting had created a total breakdown of law and order. Henry II was determined to restore law and order; consequently, his response to challenges to his authority was to demonstrate that his royal authority was accompanied by his power – that he indeed had the ability to administer justice. Henry achieved this by means of a new system that was vast and comprehensive by the standards of that era: he extended the power of the royal courts across England, in doing so displacing a patchwork of jurisdictions that had applied only local law.

To understand why Henry succeeded in presenting this as an improvement, we must examine the sources of the new common law that he established, which is at its heart a system for identifying principles and applying them to novel factual contexts.[7]

What made this approach to law possible was the renaissance of the twelfth century, a period of intellectual flourishing stimulated

by the rediscovery of long-lost digests of Roman law and works of Greek logic, which had been preserved in remote monasteries or in the Arabic libraries of recently conquered cities. These texts were glossed and disseminated by the first medieval faculties of law – at Bologna, Paris, and Oxford – which soon proliferated. In this manner the comparatively sophisticated rules of the Code of Justinian, particularly for the systematization of property rights, were analogized and extended to address specifically medieval legal problems, most notably by students schooled in the logical and dialectical methods refined by Peter Abelard and Gratian in these newly established law faculties.[8] Henry was the patron of a large number of foreign-educated scholars; they quickly became his realm's leading lawyers, judges, and teachers of law. Thomas Becket, who before his consecration was one of Henry's chief advisors, had studied law at Bologna under the Four Doctors, the outstanding legal scholars of the twelfth-century renaissance.

The common law was applied in the new law courts that were spliced out of Henry's royal court (beginning with the Court of King's Bench sometime before 1178, which would remain in London to hear pleas while the king continued his royal progress throughout his realms). The professional jurists whom Henry placed in these new law courts applied the cutting-edge legal research of the students of the Four Doctors, a fact that generated both significant excitement and esteem for Henry's reforms among England's educated classes.

The flourishing of legal scholarship was not a purely theoretical endeavour. Rather, it was intended to recreate and adapt Roman law into new technologies of governance that allowed for greater centralization. However, Henry's efforts to extend the jurisdiction of the common law courts were also intended to consolidate his power in England – something to which the barons, of course, were opposed. Henry II's troubles with his English barons – many from the same fiefs who would exact the Great Charter from his son at Runnymede – began with a rebellion while he was at war in France. Henry's victory over the barons set the stage for a further consolidation of his power in England at the expense of his nobles; the King redoubled his efforts to extend the jurisdiction of the common law courts, which facilitated centralization and professionalization.[9] This was essential as Henry left England to fight over France whenever he could, whatever the expense to his treasury and to relations with his subjects. His heir Richard I spent virtually

all of his reign abroad, first in fighting the Third Crusade and later in the interminable French campaigns, which were both funded by unpopular taxes; after he died in Limoges in 1199, his brother John, who had earlier served as his regent in England, acceded to the throne.

MAGNA CARTA: THE IGNOMINIOUS DEATH OF A PEACE TREATY AND ITS REBIRTH AS A CONSTITUTION

John's reign was a disaster. While there was nothing particularly novel about an incompetent monarch, the nature of the response was unprecedented. The growing recognition and esteem for law as a means of resolving disputes in the twelfth century led to an unexpected development in the thirteenth: those opposing the King would begin to make legal arguments about his reign and propose legal measures as a means of ending crises and rebellions. This emerging trend led directly to Magna Carta, although not in the way the story is usually told. An attempt was made to create a legally binding settlement of a rebellion – a novel approach that quickly failed; the barons then resorted to the traditional method of displacing the monarch with another claimant. Finally, after yet another reversal of fortune, John's erstwhile supporters took up Magna Carta; it would be the durable foundation of the reign of all his medieval successors.

Despite spending inordinate amounts of English tax revenue on his French military campaigns, John suffered a series of disastrous losses: his 1214 invasion of Normandy was his final military debacle. His defeat at the Battle of Bouvines was "one of the most decisive and symbolic battles in French history."[10] Bouvines marked the end of the Angevin Empire and the beginning of the First Barons' War;[11] within months of John's return to England in defeat, his vassals were in open rebellion.[12] The barons captured London, and peace talks with John were organized by the Archbishop of Canterbury. The result was the first iteration of Magna Carta, sometimes known as the Runnymede Charter: it was a peace treaty, which guaranteed a number of rights, including the right not to be subjected to extrajudicial killing.

Shortly after the agreement at Runnymede, the barons broke the fragile peace, and John appealed to the papacy to annul the Charter. Pope Innocent III extended his assistance to the king, who was in his good graces for having sworn fealty to him and taken the oath

to go on Crusade. The Pope excommunicated the barons and their supporters and later pronounced the original Magna Carta "null and void of all validity for ever."[13] After securing papal support, John's forces carved a swath across England, defeating rebels from Dover to the border with Scotland. Defeated rebels were forced to swear an oath "not in any way to hold to the Charter of liberties ... which the lord pope has annulled."[14] The Runnymede Charter was a dead letter within months of its execution.

The reversals that followed would bring it back to life. John fought his way back again from north to south, but just as a final victory was within his grasp it slipped away. The barons turned the tide by inviting the king of France's first son to take the Crown of England from John. Prince Louis would have won the war and united the crowns of England and France within months, had John not done one thing that made reconciliation possible: he died. John's death allowed the barons to dispense with Louis and assume direct control of the country through a regency for John's nine-year-old son, who was quickly crowned as Henry III. The Earl Marshal then convinced many of the barons to desert the French army by reissuing Magna Carta, initially under his own seal. It was a claim that Henry III – or rather, his regents – would abide by most of the reforms sought from John.

HENRY III'S THREE RECONFIRMATIONS OF MAGNA CARTA: 1216, 1225, AND 1264

The version of Magna Carta reissued in 1216 was significantly different from the Runnymede Charter. Crucially, it had no taint of duress, a fact highlighted in its text, where Henry noted that it was granted "of our own spontaneous goodwill," which had clearly not been the case with the Charter issued by John while the barons occupied London.[15] However, it remained unclear whether Magna Carta was anything other than a personal promise from the new sovereign, which was ultimately something that could be revoked at the king's pleasure. This fear was reinforced by the fact that it was not issued under the royal seal but, rather, under his regents', as Henry was a minor.

The status of Magna Carta as proto-constitutional instrument was fortified by its reissuance upon Henry III's majority in 1225. This version of the Charter reiterated that it was an act of Henry's free will and omits any mention of its having been issued "on the

advice of" the barons and bishops but rather states that it was issued "of his own mere motion and desire."[16] Using the royal seal, the new king granted the document "in perpetuum" – for ever.[17] What was even more significant was the fact that everyone understood that the Charter's rights were granted pursuant to a bargain. The last section of the 1225 iteration of Magna Carta states that "for this our grant and gift of these liberties ... all of our realm have given us a fifteenth part of all their movables"; setting another precedent, the Charter had been reissued in exchange for tax revenue.[18]

Their payment for the confirmation of their rights and liberties gave all of the realm's free men a stake in preserving them. Accordingly, Henry III was confined by the Charter in practice as well as in principle and could not resort to extrajudicial killing or other forms of extralegal repression, at least not in the same manner as his father. The great and the good again insisted on the reissuance of Magna Carta in 1253 in exchange for the taxes that supported another costly military campaign in Gascony, Henry's last remaining possession in France. At that time, the Archbishop of Canterbury took Henry's oath in Westminster Hall "to faithfully guard all these terms inviolate, as I am a man, as I am a Christian, as I am a knight, and as I am a crowned and anointed king" on pain of excommunication and "stink[ing] in hell."[19] This threat of anathema gave Magna Carta a sacred aura, which contributed to its prestige and purported inviolability.

Henry III's oath-breaking taxation (spent yet again on continental war-making) sparked the revolt of 1258, which led to the creation of a proto-Parliament under the terms of the peace treaty known as the Provisions of Oxford. Henry imitated his father by obtaining a papal bull that voided this agreement, which caused the Second Barons' War. Henry was captured at the Battle of Lewes in 1264, and a year later the barons – led by Simon de Montfort – convened a quasi-Parliamentary assembly in the Palace of Westminster.

Later that year, Edward Longshanks, Henry's son and heir presumptive, escaped captivity and joined the royalist forces, which defeated and killed Simon de Montfort at the Battle of Eversham. The two sides executed a peace treaty the next year known as the Dictum of Kenilworth. While this instrument confirmed royal authority over his vassals, it also required Henry to reaffirm Magna Carta, an act that further reinforced the instrument's constitu-

tional status, not only as the basis of peace between the king and his tenants-in-chief but also as the sacred and constitutional *status quo* that royal oath-breaking had disturbed.[20]

The Dictum of Kenilworth, especially after its confirmation as the Statute of Marlborough, 1267, yielded a more durable quasi-constitutional order for England, which lasted over twenty years. Magna Carta was its central pillar.[21] This order allowed for a peaceable succession after Henry's death; Edward I succeeded his father in 1272. He then summoned Parliaments in the form established in 1265 (beginning with the Model Parliament of 1295), which regularized the precedent set during the Second Barons' War. The English legal history of the late middle ages is, therefore, the chronicle of the institution and reinforcement of this new order. It is chiefly remarkable for the reinforcement of the general principle of legality and for the amplification of the specific constitutional principles in Magna Carta that prohibit extralegal punishment, particularly in the form of extrajudicial killing.

THE STATUTORY ENACTMENT OF MAGNA CARTA AND ITS AMPLIFICATION BY THE SIX STATUTES

The Parliaments called by Edward I were particularly important to the development of what became the unwritten constitution of the United Kingdom. In the third year of his reign the Statute of Westminster, 1275 was enacted, which codified much of the existing law. The newly empowered institution of Parliament was to prove decisive in the constitutional crisis of 1294–97, which was again precipitated by taxation necessitated by aggressive war-making. The solution to the crisis was a grant of taxes in exchange for the passage of Magna Carta in the form of a statute, which was referred to (including in Blackstone's list of the constitutional statutes) as the *Confirmatio Cartarum*. Sections of Magna Carta, 1297, including that which contains the ban on extrajudicial killing, remain in force today.

The principles of Magna Carta that endure to this day both as binding legal authority and as the embodiment of our Canadian constitutional values were accorded great significance during the late medieval age. In exchange for the taxes necessary to wage the Hundred Years' War, Edward III confirmed the Charter no less than fifteen times, a process that was motivated by "a desire to get the king's acknowledgement in general that he was bound by the

law."[22] By the end of Edward III's reign, the principle of legality was no longer disputable, largely due to his repeated reaffirmations and amplifications of Magna Carta.

The most important of these amplifications were the Six Statutes of Due Process interpreting clause 39 of the *Confirmatio Cartarum*. Statute the Fifth, enacted in 1351,[23] "prohibited imprisonment ... by petition or suggestion made to our lord the king, or to his council. ... [but only by] indictment of good and lawful people of the same neighbourhood where such deeds be done ... or by process by writ original at the common law."[24] Another, sometimes known as the Liberty of the Subject, 1354,[25] states that "no Man of whatever Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[26] It was now abundantly clear that the Great Charter's protections applied to everyone, regardless of station.

Parliament also acted repeatedly to safeguard the protections of Magna Carta, as clarified and extended by the Six Statutes, and made these principles even more durable. Another statute stated that any legislation that purported to narrow the protections of the Magna Carta would be null and void;[27] it specified that "no man [shall] be put to answer ... [except] according to the old law of the land: and if anything from henceforth be done to the contrary, it shall be void in the law, and holden for error."[28] This demonstrates that by 1369, the Great Charter was seen as indispensable to and entrenched within the English constitutional order, which had set up rights that were by then considered absolute and nonderogable.

MAGNA CARTA WITHIN THE MEDIEVAL CONSTITUTIONALISM: THE ORIGIN OF THE PRINCIPLE OF LEGALITY

With the medieval backdrop of the enactment of the Great Charter now before us, it is possible to turn to the question of the contemporary scope and meaning of the principles established by the relevant sections of Magna Carta. These principles are of two types: general (the principle of legality) and specific (the substantive principle of the rule of law that prevents extrajudicial punishment, including extrajudicial killing). The methodology discussed in the last chapter will be used to demonstrate how these principles can be interpreted to protect rights in the present day and done so, moreover, in a manner that is convincing and defensible, owing to

its fidelity to the text of the constitutional statute at issue and that draws on a detailed understanding of its historical context.

The development of medieval constitutionalism can be illustrated largely by reference to the shifts in the meaning of law between the execution of the Runnymede Charter and the enactment of the last of the Six Statutes almost a century and a half later. Before 1215, English law consisted in what a king executed under his royal seal. The king might decide to obtain advice from a great council before taking action, but that council, which might include his barons and bishops, would only contain those whom he chose to include: it was frequently comprised of favourites ready to jump at his every command, such as the knights who heard Henry II ask, "Who will rid me of this turbulent priest?" Those they raised up, the Angevins might also cast down: John's favourite assassin William de Braose was sent into exile when the king turned against him, and his wife and heir were subsequently starved to death while imprisoned in Windsor Castle.

The Norman–Angevin theory of kingship, which held sway in England from the Conquest until the late thirteenth century, was that they ruled by means of their force and will (*vis et voluntas*), not by the grace of God or legal right.[29] This theory entailed the belief that the expression of royal anger and ill will (ira *et malevolentia*) was integral to royal status. Vassals had to accept the possibility of their destruction at the king's hands as a fact of life.[30] Ruling by force of will frequently also required the force of arms.

For this dynasty, the law was their servant; although they were loosely confined by custom and cultural norms, these imposed only political and not legal limits on their actions.

This was no longer the case by the conclusion of the thirteenth century, as demonstrated by the *Confirmatio Cartarum*, the Six Statutes of Due Process, and other statutes (laws created jointly by the new institution known as Parliament and by the king, through his royal assent), which prohibited precisely what Henry II and John had once done as a matter of course. For those who would seek to recover the purpose – and, by extension, the essential scope – of the principles of these instruments, it is essential to understand the nature of this ideological transition.

Between the eleventh and the fourteenth centuries, England – and, crucially, Europe – shifted from a paradigm where the king created the laws to one where the law created the king, a normative order known as medieval constitutionalism: "The principle

foundation on which medieval political theory was built was the principle of the supremacy of law."[31] Henry II had no idea that this would be the result of bringing new ideas about law and justice to England. He had only wanted to make use of the law to stabilize his power and rationalize his administration; he failed to understand the implications of the emergent legal order being created in the universities founded and nurtured by the papacy, a creation he made good use of but one that could not rely on force or custom alone for its authority.

This is because many of the legal procedures at the core of the early English common law – Henry's common law, as he believed – were in fact adapted, often with only superficial changes, from the canon law his principle jurists had studied in the universities. Within that tradition, the idea that the rule of law was antithetical to the rule of men lay dormant. Having slumbered in dusty tomes of Roman law hidden in monasteries for centuries,[32] this concept flourished in the light of learning once those dusty tomes were brought to medieval universities that had been founded by Papal bulls and staffed exclusively by clerics – men who did not see themselves as vassals to a king's *vis et voluntas*.

THE CONCEPTS OF NATURAL LAW AND DIVINELY-ORDAINED RIGHTS IN ROMANO-CANONICAL PROCEDURE

As the popes did not rule by force of will or conquer with feats of arms, they needed a different theory of authority than the strongmen who had seized and held thrones. This they found in the theory of the natural law developed by the theologians and jurists in the church's institutions of learning. Medieval universities were religious institutions in every sense; students had the legal protection afforded to the clergy and were subject only to canon law, even in England. Henry II had barred his subjects from studying in Paris in 1167 during a quarrel with Thomas Becket, as the ideas being taught there were inimical to his rule by *vis et voluntas* (which often required the use of *ira et malevolentia*), but it was too late to stop the spread of teaching of contrary ideas. The response of those scholars who had wished to travel to Paris was to congregate in Oxford instead: this occasion is generally considered to be the founding of its university. (King John's decision during a quarrel with Innocent III in 1203 to allow the execution of three Oxford students who were

otherwise only subject to canon law was the impetus for the founding of the University of Cambridge).

These universities' law faculties armed the vanguard of the movement to recover Roman law and adapt it to medieval contexts. To do this, they relied on the newly recovered Aristotelian theories of argument found in the *logica nuova* (which had only survived the dark ages in Arabic translations); these theories were quickly adapted into textbooks of legal reasoning by Gratian and Peter Abelard. By the time the Runnymede Charter was executed, jurists trained in the universities were being taught that the requirements of natural justice were divinely ordained; Thomas Aquinas formulated his magisterial treatment of the natural law at roughly the same time that Henry III swore to uphold Magna Carta on pain of excommunication. General principles quickly begat specific protections: the argument that the right not to be punished without a trial was unconditional was formulated in the thirteenth century by jurists who "began to argue that the *ordo iudicarius* [the theoretical basis of common law trial procedure] was not derived from civil law, but from the natural law."[33]

Stephen of Tournai, Abbot of St Genevieve (a monastery with a school and library that evolved into the University of Paris) defined the *ordo iudicarius* of the twelfth century: "The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may be rendered only after someone has been convicted or confessed."[34]

In the thirteenth century, the continent's leading jurists – such as Azo of Bologna, a scholar from whom Henry of Bracton frequently copied verbatim – asserted unequivocally that no emergency could authorize a ruler to dispense with the requirement of a trial. Relying on these figures, Innocent III "maintained that a prince could not abolish the judicial process or ignore an action, because he was bound by natural law to render justice."[35]

The Six Statutes of Due Process' insistence on due process in the common law courts was, therefore, entirely consistent with continental jurists' attitude towards the *ordo iudicarius*, and these statutes' uncompromising stance towards the king, requiring his compliance with its provisions at all times, conforms with the norms of medieval constitutionalism. For this reason, these statutes served as a bridge between the most general principle underlying the rule

of law – the principle of legality – and its practical application, by memorializing the conclusion that specific substantive principles that create nonderogable rights are necessary if that general principle is to be meaningful.

The king was now required to relate to his subjects in a manner that observed clear and absolute legal limits that served to prevent the king from circumventing all constraints on his authority. Then as now, the simplest way to justify the use of brute force is to insist that it is lawful. Before Magna Carta became entrenched in the English constitutional order, the Norman and Angevin kings had not needed to make such justification. They had merely relied on a theory of kingship that located the king's ire outside of the legal order; it was as sublime and inscrutable as the wrath of God. The law that Henry imported into England in the twelfth century was a product of a new view of the divine order – Aquinas's – in which even God's authority was rational and understandable. However, after accepting theoretical limits on the limits of their rule, the Plantagenets sought to continue the same practices that had made kings laws unto themselves, chiefly by killing their subjects on their own authority.

What Henry II had done as an expression of royal will, Edward I would attempt to justify as a measured application of an extraordinary legal prerogative. Rather than bellowing out in anger to their retainers, after Magna Carta kings would have their scribes prepare documents for the application of the royal seal. But when kings attempted to kill with the stroke of a quill, late medieval jurists were quick to recognize the implications of a constitutional order that allowed the most powerful actor the unfettered legal discretion to kill his subjects without legal process. They understood that this would mean that the general principle that the king was bound by the laws – as found in Magna Carta – would not be worth the parchment on which it was engrossed. Accordingly, the Six Statutes and the Treason Act clarified that clause 39 of Magna Carta created an absolute right not be subjected to royal death warrants, however they were styled.

MAGNA CARTA'S SPECIFIC PRINCIPLES CREATE RIGHTS NOW THREATENED BY TARGETED KILLING PROGRAMS

The Six Statutes were a direct response to Edward I's attempt to exploit clause 39's failure to conform his purportedly legal sanctions

to the norms of the *ordo iudicarius;* he argued that the law of the land allowed him to issue a death warrant on his own authority if he adjudged someone an outlaw and recorded this on the court rolls using his own seal. This quasi-legal process, which would allow the king to serve as judge, jury, and executioner, arguably conformed to the letter of Magna Carta, as the standard created by its reference to "the law of the land" was unclear.

Edward used this procedure in 1282 to authorize the execution of Daffyd ap Gruffydd, the last sovereign Prince of Wales.[36] This use of the royal seal caused great anxiety in Edward's vassals. In response, Parliament began to define due process such that this would clearly fall outside of what was permitted under Magna Carta, 1297. By requiring someone to be "put in answer," Parliament made it clear that the legal proceedings would need to conform to the *ordo iudicarius*, which required the presentation of the accusation and an opportunity to respond before anyone could be judged an outlaw. The Treason Act, 1351 made it clear that this protected those accused of treason. "After the Treason Statute was put into place in 1351, the legal community retroactively condemned ... the summary conviction of the accused on the king's own word that he was in fact guilty."[37] By the middle of the fourteenth century, it was clear that even alleged traitors and rebels had a right to a trial in which they were called to answer specific allegations and given an opportunity to rebut them.[38]

When read together, the Magna Carta and the late medieval statutes that defined its protections establish that the executive could not use brute force against any of his subjects, "whatever their estate or condition," on his own authority. Instead, monarchs were confined to proceeding against their subjects using legal processes that conformed to the natural law or in modern terminology, a requirement of natural justice: namely, an opportunity to answer the charges.

The targeted killing programs of the United Kingdom and the United States – in which Canada participated in 2015 – deny those suspected of treason, that is, of allying themselves with these nations' enemies, of this absolute right. These programs' victims are killed on the basis of allegations brought by intelligence officials to the executive: in the United States, the order to kill a citizen must be signed by the president himself.[39] These allegations are never seen by judges: in the case discussed in the introduction to this volume, one such target pleaded in vain for a day in court before he was

killed on President Obama's order.[40] This is precisely what Magna Carta and its fourteenth-century clarifications prohibit; it is this practice that led to their enactment. Following Bingham's methodology with a review not only of the text but also the context of Magna Carta, we find definitive evidence that the drone strike program is covered by the scope of the principle at issue: it achieves precisely what the framers of the statute that includes the principle were seeking to prevent.

In the United Kingdom, the Joint Parliamentary Committee on Human Rights noted that "the Government's policy on the use of lethal force outside of areas of armed conflict does contemplate the possibility of pre-identified individuals being killed by the State" and "compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply." It is not hard to understand why the government of the United Kingdom has taken the position that no legal framework other than the Law of War need be considered; however, if one considers the constitution of the United Kingdom, it is clear that this position is contrary to clause 39 of Magna Carta, which remains part of the statutory law of the United Kingdom and part of its unwritten constitution to this day. The substantive principle it contains also remains part of Canada's.

In ignoring the fact that their nations' own constitutions provide the relevant legal framework, the governments of the United Kingdom and Canada also violate the general principle established by Magna Carta, namely the principle of legality. They have failed to recognize the existence of legal limits on their own authority, as if Magna Carta, 1297 did not exist.

The absence of constitutional controversy over the practice of targeted killing in the United Kingdom and Canada reveals how dangerous it is to become unmoored from constitutional history, even the oldest parts of that history; they provide not only the basic structure of the legal order in the form of general principles but also specific constitutional protections that make every constitutional right meaningful. The right not to be killed, established by a bill passed by both Houses of Parliament and signed into law, is meaningless if one signature is all that is needed to condemn someone to extrajudicial killing. It is unclear how any other right could be considered meaningful if that practice is allowed to take root; like a strangler fig on the living tree, as it grows it could destroy Canada's rule of law.

4

Stuart Theories of Extraordinary Prerogative and Legal Impunity Rejected

The distinctive feature of the English revolution is that it was actually justified by reference to law – *Magna Carta*, the *Petition of Right* and the common law ... The crown had violated this fundamental law by its "prerogative courts" like the Star Chamber.

Geoffrey Robertson, *The Tyrannicide Brief*

Magna Carta and the Six Statutes are the only examples of medieval legislation that have been continuously recognized as statutes of constitutional significance from the era of their enactment up to Blackstone's enumeration in his book of authority, indeed up to confederation and beyond. These sources did not establish a rule of law on their own: they contain only the general principle of legality and the substantive principle barring extrajudicial punishment by the executive. Yet as modest as these restrictions were, they could not be tolerated by certain monarchs who believed that they alone should be the judge of their own powers, such as the power to define what constitutes punishment and distinguish that from emergency measures such as preventative detention. Inevitably, a new constitutional crisis ensued, again followed by new constitutional statutes that, this time, memorialized the principles that prevent the use of emergency powers to subvert the constitution.

The two constitutional statutes that follow Magna Carta and the Six Statutes in Blackstone's enumeration, which are also the focus of this chapter, are the Petition of Right, 1627 and the Act Abolishing the Star Chamber, 1641. These statutes resulted from the next crisis in English history, which took place in the early Stuart era, during the reigns of James I and Charles I (1603–49). This is the first civil strife in English history since the First Barons' War that can be properly considered a constitutional crisis, as it was framed by competing views of the limits of royal authority, of the king's duty

to observe the laws, and of his right to dispense with them whenever he decided this was necessary in the interests of state.

The Petition of Right responded to James I's use of his absolute prerogative to impose taxes without parliamentary approval, something he did frequently, whether to raise money for aggressive foreign policy or to destroy members of the constitutionalist opposition. James did not resort to extrajudicial assassination when he could simply reduce critics of his emergency powers to penury and obloquy. The Act Abolishing the Star Chamber, 1641 aimed to prevent James's son Charles I from employing that court for the like purpose. By Charles's reign, it was evident that Magna Carta's requirement that punishment could only follow after conviction according to the law of the land meant nothing if the law allowed for conviction and sentencing in a court with a membership controlled by the king's closest councillors. The Star Chamber and other bodies possessing conciliar jurisdiction had by this point degenerated into instruments of the king's will; therefore, by abolishing them, the constitutionalists closed another avenue for the subversion of the constitutional principles of the Petition of Right. That statute's elimination of the Council Board, which like the Star Chamber was simply the Privy Council sitting in quasi-judicial role, embedded another substantive constitutional principle into the constitution: the abolition of the only public body that had the power to authorize torture effectively abolished the practice of torture from the English constitutional order in perpetuity and created what has ever since been considered an absolute right not to be tortured.

The early modern era is properly considered the period in which the medieval constitutionalism detailed in the last chapter was transformed into a form that we would recognize. In particular, it is evident to modern readers of constitutional history that the Petition of Right was the first articulation of what the Supreme Court of Canada has labelled a general unwritten constitutional principle of constitutionalism, an essential corollary of the rule of law that builds upon the principle of legality embedded by the Magna Carta.

It is essential to the preservation of any constitutional order that there be no source of legal power outside of the constitution itself. However, as was the case with Magna Carta, this general principle is not sufficient, as it cannot protect itself from the specific practices that violate it if the executive can make a spurious claim that it has a constitutional basis for an extraordinary power – like the authority to order torture – that renders the other principles worthless. If

the king has an unquestionable power to order dissidents detained at pleasure and tortured into confessing their guilt, the right to a trial governed by the requirements of due process becomes academic. The prohibition on torture was therefore another essential step towards implementing a set of specific constitutional principles with associated absolute rights, which would, collectively, ultimately yield a self-contained rule of law capable of preserving itself and the principles of legality and constitutionality through crises of the same type that had generated them.

THE CONSTITUTIONAL CONTEXT OF THE DYNASTIC AND RELIGIOUS STRUGGLES: 1455–1559

The backdrop of the constitutional crisis of the early Stuart era is found in the period of relative stability that preceded it, during which the relevant legal norms that the crisis disturbed had become the bedrock of the existing constitutional order and had generated further statutory elaboration of what had previously been an implicit consensus. This consensus could be preserved in periods of turmoil that did not threaten the constitutional order, including the sustained warfare that looms large in the history of the late middle ages. From 1337 until 1453, as is well known, the kings of England were preoccupied with the Hundred Years' War. Every campaign was an attempt to reconquer the French fiefdoms that King John had lost. Henry V's triumph at Agincourt was undone by his premature death, and the claims of his infant son Henry VI were lost during an inept regency: as the chorus declaims at the conclusion of Shakespeare's eponymous play: "Henry the Sixth, in infant bands crown'd King/Of France and England, did this king succeed/Whose state so many had the managing/That they lost France and made his England bleed."

English soldiers had indeed bled in France, but this was preferable to hosting the *routiers* and free companies that scourged Normandy and the Low Countries;[1] however, the nation's sustained respite from warfare on its own soil was ended by the Wars of the Roses.[2] While the Wars of the Roses raged across England between 1455 and 1485, they led to no constitutional crisis – the legal order of the realm was beside the point; this was simply dynastic warfare over the succession. The Wars were not ended by treaty or any other quasi-legal method but by the decisive victory of Henry VII over Richard III at the Battle of Bosworth Field. Henry declared

himself king "by right of conquest," although he also successfully united the warring houses by his marriage, which brought together his own family ties to the House of Lancaster with those of his wife, Elizabeth of York (after having stripped her family tree of all of its other branches). After Henry's coronation, he summoned Parliament, which treated his reign in no way different from that of his predecessors. This warring had not altered the relationships between monarchs, parliaments, and people. From a constitutional perspective, England had merely substituted one ruling house with another; the innovations of early modern English governance began during Henry VII's reign, but these were not primarily constitution in nature and were not a feature of the dynastic transfer.

CONSTITUTIONAL PATRIOTISM: THE *ORDO IUDICARIUS* BECOMES THE FUNDAMENTAL LAW OF ENGLAND

The constitutional continuity that spanned these dynastic wars is plainly evident. The final reconfirmation *of Magna Carta* occurred in 1423. This was agreed to as a means of securing popular consent to the regency council headed by Henry VI's uncles, who in agreeing to the reconfirmation affirmed their commitment to the principles of medieval constitutionalism. It was just what the Earl Marshal had done to inaugurate the regency of Henry III. Furthermore, this continuity is reflected in the legal treatises of the time. In 1470, Sir John Fortescue, who had been lord chief justice of England under Henry VI, wrote a volume entitled *The Governance of England: Otherwise Called the Difference Between an Absolute and a Limited Monarchy* (hereinafter *Governance*). Here Fortescue describes the constitutional principles that had been long established by the end of the late middle ages.[3] The main thrust of this text is to reaffirm that the English monarch is constrained by the laws, but it also describes a potential loophole, which when exploited by the Stuarts would ultimately lead to constitutional crisis and civil war.

The king, Fortescue notes, only has freedom to act in a manner that is defined by the laws: his "absolute power," or power to act directly without legal process, is confined to a carefully circumscribed set of customary areas, but these may only be exercised when they are not "contrary to law." The king of England rules under the county's laws, which "are made by their [the peoples'] consent and approbation [so that they] enjoy their properties securely, and without the hazard of being deprived of them, either by the king or

any other ... St Thomas [Aquinas] ... wishes ... that the king might not be at liberty to tyrannize over his people, which only comes to pass in the present case, that is, when the sovereign power is restrained by political laws."[4]

On the basis of this general theory it is not surprising that Fortescue concludes, with respect to emergency powers in particular, that there is a "legal principle that no one may be put to death without trial."[5] Fortescue, like all orthodox medieval jurists, recognized that general principles like that elaborated by Aquinas required the support of substantive principles like those found in Magna Carta, which they believed recognized absolute rights. In his *Governance*, Fortescue presented a well-elaborated and particularly English variation of the argument that the king is bound to observe the normal *ordo iudicarius* because its protections are not merely positive laws.[6] This transitional principle, which is closer to the principle of constitutionality than that of legality (as it holds the king's behaviour to a standard that contains not only express legal limits but also general principles that protect these legal limits from being eroded), would be sorely tested in the constitutional crises to come but not until after further turmoil during the reigns of Henry VII's son and his grandchildren.

Henry VIII acceded to the throne at a time when it appeared the nation's governance rested on firm principles: his father had not attempted to redefine the constitutional order of the realm or his place within it, although he had introduced a number of administrative and legal innovations. Some of these would later prove problematic, in particular Henry VII's decision to extend the jurisdiction of the Court of Star Chamber;[7] however, the constitutional implications of this decision would be left to later generations to reckon with in the period this chapter discusses in detail: the early Stuart era.[8] Henry VIII's reign was nothing if not tumultuous – famously so. This is in part due to the fact that he was, in Dickens's words: "a most intolerable ruffian, a disgrace to human nature, and a blot of blood and grease upon the History of England."[9] Yet while Henry challenged the canonical foundations of the international legal order, in the main he respected the constitutional principles that had been successfully grafted into the domestic constitutional order of England. The crises of Henry's reign were not rooted in clashes between the king, Parliament, and the courts. Accordingly, by the standards of that time they did not intersect the constitutional plane but remained dynastic and theological in character;

Henry's repression of those who opposed his religious innovations and attempts to secure a male heir depended on the cooperation of Parliament. This king did not resort to condemning his enemies under his own seal or declaring them outlaws on his own authority, contrary to Magna Carta and the Six Statutes of Due Process. Additionally, while Henry VIII made use of the Court of Star Chamber to punish his officials, he did not use it to punish dissidents who had never been in his service.[10]

When he punished his enemies, Henry's counsellors took care to proceed in ways that appeared legal and in keeping with earlier practice. The king's enemies – chiefly those close allies he later spurned, including Cardinal Wolsey, Thomas More, and Thomas Cromwell, in turn – were not executed until they had been convicted in state trials. Additionally, while those prisoners whom Henry (and his daughters Mary I and Elizabeth I) designated enemies of the state were racked and tortured in the Tower of London, this was not yet against the law. As will be demonstrated in detail in this chapter, the emergence of the substantive principle of the rule of law that creates an absolute right against torture was part of the transition from the general principle of legality to one of constitutionalism. This only took place after the Tudors made way for the House of Stuart.

STUART IDEAS OF KINGSHIP AND PRIVILEGE: TENSION WITH EXISTING CONSTITUTIONAL NORMS

King James I acceded to the throne of England in 1603 without causing a succession crisis despite the presence of factors that would have led to considerable difficulty for a medieval monarch. This peaceful accession prefigured his rule, which was marked not by insurrection but instead by tensions that are typical of the early modern era: after Elizabeth I's long reign, a new but implicit constitutional arrangement had been achieved, which would be challenged by James's foreign ideas about kingship, the law, and the constitution (and he was, after all, a foreigner – Scotland had been the *auld enemy* for centuries before the personal union James's coronation created). These ideas clashed with certain constitutional principles, which most English jurists now believed were integral to the country's legal order. In short, the conflicts between James and his subjects were constitutional and not dynastic in nature.

James was initially very popular in England, but constitutionalists became uneasy even before his accession: Edward Coke was alarmed when he heard that James had – contrary to Magna Carta – sentenced a pickpocket to death without a trial at Newark during his coronation progression from Edinburgh to London.[11] The unease spread when it became clear that this was entirely consistent with James's views on kingship. James was a fervent believer in the absolute rights of kings. While king of Scotland, he took the time to write learned treatises advocating this view, which argued, among other things, that "the essence of a free monarchy was that royal power was limited by no human law."[12] Still, James won many of the initial skirmishes fought over the scope of his powers. In *Bates's Case* (1606), for instance, he successfully defended the early Stuart theory of the royal prerogative. Johan Sommerville (quoting the judgment of Chief Baron of the Exchequer Nicholas Fleming) defined that theory thus: "'The king's power is double, ordinary and absolute,' [declared Fleming] ... His ordinary power applied in cases where the public interest was not involved, and here the monarch was bound by the common law ... But in matters which concerned 'the general benefit of the people' the king possessed an absolute power, subject only to the rule of 'Policy and Government.' The implications of these rules, said Fleming, were to be determined by 'the wisdom of the king, for the common good' and 'all things done within these rules were lawful.'"[13]

Not everyone was convinced, however. Parliament's response to *Bates's Case* – articulated primarily by Nicholas Fuller and James Whitelocke – framed the dispute as a debate over the prerogative, a debate that changed little between 1610 and 1641. Indeed, these influential speeches from Whitelocke and Fuller "were published in 1641 as propaganda justifying recent proceedings in the Long Parliament – another indication of how little the essentials of the anti-absolutist case had changed in the course of the early seventeenth century," during the sustained constitutional crisis of the early Stuart era.

JAMES I AND EDWARD COKE'S BATTLE OVER THE COMMON LAW AND THE ROYAL PREROGATIVE

Towards the end of James's reign, the battles over the extraordinary prerogative shifted from the courts to Parliament, and the new terrain did change the nature of the engagement somewhat. The

struggle remained a contest between constitutionalists and absolutists. This move occurred when James ran afoul of a jurist who was far less amenable than Fleming and far more learned: Edward Coke, who was also considerably more dogged. It was Coke's efforts that allowed the constitutionalists to rally in Parliament after suffering reversals in the courts.

Like his bitter rival Sir Francis Bacon, Coke possessed one of the most formidable intellects of his generation; unlike Bacon, he dedicated it to defining and protecting the English constitution. This goal was his lodestar in the course of every role he assumed: legal scholar, Speaker of the House of Commons, judge, lord chief justice of England, and, finally, the central figure in the House of Commons at the time of the Petition of Right, 1628. He was the prime Elizabethan specimen of what has been termed the "common law mind."[14]

As chief justice of common pleas, Coke said in James's presence that "the King in his own person cannot adjudge any case ... this ought to be determined and adjudged in some court of justice, according to the Law and Custom of England." This statement "nearly led the King to assault Coke," because of "how greatly he was upset by the assertion that his prerogative was under the law of the land."[15] It is clear why James was upset: Coke had implicitly rejected the theory that his extraordinary prerogative was not subject to law. James punished Coke by transferring him from the bench of the Court of Common Pleas to the Court of King's Bench, where his fellow judges were not as inclined as he to challenge the king. For that reason, in 1614, Coke was unable to prevent the conviction for high treason of Edmond Peacham, an obscure rural clergyman, for simply having written some notes for a sermon that vehemently denounced James's use of his prerogative.[16] Before his trial, Peacham was sent to the Tower of London to be tortured, which likely led to his death in jail before he could be executed.

However, two years later, Coke successfully persuaded his fellow justices of King's Bench to stand with him against James in two cases that cut to the core of the dispute about the supremacy of the constitution or the prerogative, as they involved an alleged royal prerogative to regulate the jurisdiction of the courts, something that Elizabeth I had effectively conceded was not within her powers.[17] The first was known as *De Rege Inconsulto*.[18] James had attempted to weaken the Court of Common Pleas by creating a new office for writs of *supersedeas*. Bacon, who was then the attorney

general, presented a writ *de non procedendo* to terminate a suit challenging the king's reorganization of the court, arguing the judges had no right to question whether the writ presented sufficient cause to remove the case from them "to your Chancellor ... who is ever a principal counsellor and instrument of the monarchy of immediate dependence on the king."[19]

This use of the king's prerogative to terminate a case brought in a common law court raised the stakes. In defending his position that the king's decision could not be questioned in any way, Bacon foreshadowed the position that he would take as James's chancellor a year later: "[T]he King's title (or right) shall never be discussed ... no man can contradict it ... you may not come with a *queritur* against the king, but you must humbly supplicate unto him ... Therefore I will end with this to your lordship [Edward Coke] and the rest, that *obedience is better than sacrifice* ... I know that the court will remember whom *they* serve."[20]

Bacon's arguments that counsel for the defendant should not be allowed to raise the issue of the validity of the king's writ were squarely rejected, but after his appointment as chancellor he continued to goad James on the question of the prerogative; he did this by consistently advising James to take aggressive action against the common lawyers who questioned it and by proposing various legal reform projects that would lessen those lawyers' ability to resist what they saw as royal encroachments. Bacon also provided suggestions to James about what "is fit to be done for the winning or bridling of the lawyers ... that they may further the King's causes, or at least fear to oppose them." For this reason, the settlement in *De Rege Inconsulto* was only a short lull before the next storm: the *Case of Commendams*.

The *Case of Commendams* was a challenge to the King's transfer of a benefice to Richard Neile, bishop of Lichfield, using the writ *in commendam* to override the prohibition on holding more than one ecclesiastical post. Neile, who in 1612 was responsible for the last burning at the stake for heresy in English history, "continued in high favour with the king ... In the debate in the House of Lords ... [Neile] made himself prominent by a violent attack upon the commons and a strong declaration of the royal prerogative."[21] While the case was pending, James requested a stay of proceedings and a private meeting with the justices, which at the very least would have created an appearance of impropriety.

The king stated that he wanted to advise the judges because his prerogative might "be wounded as well if it be publicly disputed upon, as if any sentence were given against it."[22] This is a claim that his privilege would suffer through the mere act of its legality being questioned. Refusing the meeting, the judges all signed a letter to James written by Coke saying such a meeting would be "contrary to law." James replied, ordering them "out of our absolute power and authority" to meet him at Whitehall.[23] At that meeting, James raged against the justices, tearing up their letter and stating (contrary to Fortescue): "I well know the true and ancient common law to be the most favourable to Kings of any law in the world, to which law I do advise you my judges to apply your studies."[24] This atavistic display of *ira et malevolentia* induced most of the judges to fall to their knees, pledging to obey his command that they would not hear any challenges to his authority, in order that "any effort to raise the issue of his prerogative would be summarily silenced."[25] In Coke's account of this meeting, he did neither of those things, but merely said that "when the case happens I shall do that which shall be fit for a judge to do."[26]

James then gave a public address on the topic of the prerogative in the Star Chamber, which at that time served a symbolic reminder of his power to order his subjects to face trial in bodies controlled by his Privy Council rather than in common law courts. In this speech he set forth his reasons why the prerogative could not be adjudicated by judges or spoken of by lawyers: "The absolute Prerogative of the Crown is not subject for the tongue of a Lawyer. It is a presumption and Treason in a Subject to dispute what a King can do ... The Judges ought to check and bridle such impudent Lawyers and to disgrace them."[27] Neile retained his second benefice and went on to further prominence, serving frequently in the Court of Star Chamber under James's heir, Charles I.

On Bacon's advice, in 1617 James ordered Coke brought before the Council Board. That body was composed largely of the same high officials who comprised the Court of Star Chamber, which issued writs authorizing the use of torture in the Tower of London. Coke was charged with making "speeches of high contempt" and "uncivil and indiscreet carriage before his majesty." He was dismissed from the bench and instructed to "review his book of [law] reports ... his majesty's pleasure was that he should bring the same privately to himself, that he might consider thereof as in his princely judgment should be found expedient."[28]

COKE, THE PETITION OF RIGHT, AND THE PRINCIPLE THAT THE PREROGATIVE IS SUBJECT TO THE LAW

In 1625 James I died and the throne passed to his son Charles I, who had all of his father's absolutist views but none of his political shrewdness. Charles and his advisors resorted to what was soon known as the "forced loan," supposedly merely a suggestion from the Privy Council for voluntary benevolences to the treasury, a pretense that fooled no one. It was necessary, however, because Parliament would not approve taxes for more foreign wars.[29] Charles's advisors were not as alert to the danger of relying on the prerogative as had been his father's: Francis Bacon had an argument ready to suggest to commissioners raising "voluntary" contributions in 1615 that "[King James] is an enemy of innovation. Neither doth the universality of his own knowledge carry him to neglect or pass over the very forms of the laws of the land ... As for the use of the Prerogative, it runs within the ancient channels and banks ... My Lords here of the Council and the King himself meddle not (as hath been used in former times) with matters of *meum and tuum*, except they have apparent mixture with matters of estate, but leave them to the King's Courts of Law or equity."

By 1627, this rang false: Charles was clearly appropriating his subject's property in increasingly novel ways. Coke's successor as chief justice of King's Bench was dismissed for refusing to declare this taxation legal; martial law was imposed on the country in order to collect it.

Those who refused the forced loan – including the dissidents known as the Five Knights – were imprisoned on royal warrants. In the *Five Knights' Case* they petitioned for writs of habeas corpus. In arguing that the king was not obliged to offer any legal basis for their imprisonment, the attorney general advanced Charles's theory of the royal prerogative, which was hyperbolic even when compared to his father's: he claimed the king has an *"absoluta potestas* [absolute power]" and that "the sovereign ... has rules to govern himself by."[30] Charles argued further that only the king could judge his own conduct; no one else could challenge him when he asserted that special circumstances applied, a privilege that allowed him to use his absolute power in defence of the common good. No one could question whether he had done so within the appropriate limits set by the law of God that had granted him these powers.

The constitutionalists considered this argument unacceptable. It was contrary to Magna Carta. In response to the situation, parliamentarians began the debate that would lead to the Petition of Right. While the forced loan was being collected under martial law and dissidents were being denied habeas corpus, Parliament began to debate the legality of the king's extraordinary prerogative. The parliamentary resolutions prepared by Coke that later formed the core of the Petition of Right were "a dogmatic summary of subjects' rights as enshrined in English 'due process' legislation since 1225," when Magna Carta was promulgated upon Henry III's majority.[31]

The debates of 1627 reveal that members of Parliament believed that the principles of medieval constitutionalism were under attack (as the constitutionalists framed the crisis in those terms) and that specific restrictions on the royal prerogative were necessary if any effective restraints on royal power were to remain intact. The problem that Parliament had to address in the early Stuart era was the fact, acknowledged by Fortescue, that the prerogative was part of the laws of England. Their response was to create the modern constitutional principle of constitutionalism, in which law can only be considered valid if it is consistent with the constitution.

Charles's initial reply to Parliament's vision of the Petition of Right indicates that it was the idea of limiting his prerogative that he found most problematic. After he agreed to its provisions in principle, he sent a message to the House of Commons "forbidding them to meddle with affairs of state." The constitutionalists' response was bold and uncompromising: Parliament refused to acknowledge the existence of an extraordinary prerogative. For similar reasons, they rejected an amendment proposed by the House of Lords that would allow the king to imprison subjects for a limited time without showing cause "for reasons of state." Coke noted that allowing this would amount to Parliament's recognition of "an intrinsic prerogative ... entrusted by God ... [that] no man can take away."[32]

The early Stuarts' reliance on the extraordinary prerogative increased steadily; these crises ratcheted up the use of the Star Chamber and the Council Board to clamp down on those who challenged the king's use of an extraordinary prerogative, one rooted in what Charles and his counsellors believed was his *absoluta potestas*. The repression of the constitutionalist viewpoint was essential to prevent widespread resistance to the exercise of prerogative in extraparliamentary taxation.

After agreeing to the Petition of Right, Charles refused to call any more parliaments, and the period known as his "personal rule" began. From 1629 to 1641, Charles needed great sums of money to make up for what would have been ordinarily granted by Parliament. One key source of extraparliamentary funding during his personal rule was ship money. Ship money was traditionally obtained by imposing duties on maritime communities during wars conducted at sea but only communities that were involved in shipbuilding. In 1635, Charles attempted to raise ship money during peacetime in inland counties that had never been previously subjected to the imposition. The king gave only his implicit promise that it would fund the navy; he later insisted that he had no duty to answer any questions from his subjects about whether or not it had actually been spent on maritime defence.

John Hampden's refusal to pay set the stage for the last great confrontation between the king and the constitutionalist opposition on the principle of constitutionality before the end of his personal rule. In Sir David Keir's words, "the point before the court ... was the same that had already been decided in Bates's Case and Darnel's [the Five Knights'] Case ... the problem was to determine the King's discretionary power to act for the public good."[33] This depended on whether the king had an absolute power to act outside of the laws, as the Petition of Right had eliminated his right to raise extraparliamentary funds in this manner.[34]

Oliver St John argued for Hampden that if the king alone was the judge of whether an emergency existed and also the sole judge of the scope of his prerogative in that situation, then no English subject had any rights. This of course was a summary of the primary complaint of the Petition of Right, which had asserted that this absolutist principle was not consistent with a subject's "fundamental propriety in his goods and a fundamental liberty of his person," rights which the constitutionalists argued the king was bound by the constitution to respect, even during emergencies.

Responding to St John, Sir Edward Crawley asserted that necessity, as assessed by the king, was always superior to the law of the land.[35] Sir Robert Berkeley's judgment conceded the existence of "fundamental policy, and maxims, and rules of law for the government of the realm," that barred taxation except as it was approved by Parliament but added the following: "[If Hampden believed] 'that this fundamental policy in the creation of the frame of this kingdom' meant that the king could be restrained if he tried to

raise money except through parliament, he was 'utterly mistaken herein' ... Berkeley described the arguments of Hampden's counsel, in often-quoted words, as 'a king-yoking policy,' and declared [quoting one of King James I's most provocative assertions of absolute power] that he 'never heard that lex was rex [that law was king] but rather the reverse, for the King was lex loquens, a living, speaking, acting law.'"[36]

Justice Berkeley also held that, "In a case of necessity ... the king had 'regal power' to make extraparliamentary levies."[37] Rejecting Baron Littleton's arguments that these emergencies should be brought to Parliament's attention, Berkeley held that the king alone was the judge of the necessity. This judgment was an extension of the logic of Baron Fleming's decision in *Bates's Case* but adopted collectively by the common law judges. What was different about this decision was that it explicitly ignored an intervening statute – the Petition of Right – that Parliament had passed in order to prevent the king from taking precisely these sorts of actions. Following Berkeley's reasoning, Parliament could never bind the king, since he could operate above the statutes whenever he declared an emergency, even in peacetime. On this logic, he was not even bound by Magna Carta. The court had thus declared England to be closer to an absolute monarchy in practice than it had been in centuries.

This historical context of the period after its enactment allows us to understand that the Petition of Right, 1627 does not merely contain the substantive principle that the government cannot force anyone to tender a "gift, loan, benevolence, tax or such like charge without common consent by Act of Parliament";[38] it also instantiates a more general principle, which became clearer when it was ignored: that the Crown possesses no extraordinary prerogative that is not subject to being overruled or negated by common law and legislation. After the *Case of the Ship-Money*, this general principle served as the justification for the enactment of legislation eliminating privileges and creating substantive principles that created absolute rights, such as the right not to be tortured.

THE ABOLITION OF THE STAR CHAMBER: A BLOW AGAINST CONCILIAR JURISDICTION – AND TORTURE

The result of the *Case of the Ship-Money* ratcheted up the tensions between the king and Parliament significantly, but Charles was forced to summon Parliament in 1641 as the Treasury edged to-

ward bankruptcy in the face of resistance and evasion of extraparliamentary levies. Despite this, after only three weeks Charles dissolved the so-called Short Parliament upon seeing that it was intent on addressing his failure to observe the Petition of Right. Reversing tack after failing to secure a forced loan from London's merchants, he then summoned what was later known as the Long Parliament. It would sit for eight years under Charles and, after his execution, for twelve more as a rump under Oliver Cromwell. In its first year, this Parliament passed the Act Abolishing the Star Chamber, 1640:[39] one of the most important but least understood of the constitutional statutes.

This act is known by many names. The unofficial short title of the act, used here, does not reflect its original scope and purpose; it was originally entitled "An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber." The act's meaning is clarified by awareness of this title, since it did much more than abolish the Star Chamber, a fact which is essential to our understanding of the principle that it embeds within the English constitution and ours. The Act Abolishing the Star Chamber, 1640 regulates the Privy Council by stripping its power to behave like a court, which it had abused in the course of defending the king's theory of his extraordinary prerogative and which it had exercised primarily in the form of the Court of Star Chamber but in the form of the Council Board as well.

The Court of Star Chamber has a murky early history. It originated as a branch of the king's own royal court (i.e., the *curia regis*, the body comprised of his advisors on all matters), where the Norman and Angevin monarchs of the high middle ages sat *in personam* to dispense justice. After Henry II's reforms, this duty was delegated to the *consilium regis*, which became the Privy Council.[40] While Magna Carta and the Six Statutes appeared to mandate the use of common law courts in all criminal matters, the *consilium regis* was seen as an exception because it predated those elements of the constitution.

The constitutionalist lawyers of the seventeenth century tolerated this enclave of royal jurisdiction inside the legal system, as the Court of Star Chamber also had a statutory basis for its jurisdiction – with clear limits – in the form of a statute from the reign of Henry VII.[41] This gave the court the power to prosecute those involved in riots (which at that time referred largely to violent interfamilial feuds, usually over land rights) and the perversion of justice, areas

which were thought to be related to the residual function of the *consilium regis*, which was to restrain the king's most powerful vassals. According to the influential sixteenth century treatise of Sir Thomas Smith, the Court of Star Chamber was necessary because of "Stout noble men ... who made their force their Law, banding themselves together with tenants and servants to do or revenge injury against one another ... the effect of this Court [is] to bridle such stout noble men ... [whose victims] cannot be content to demand or defend the right by order of [common] law, but who must appeal to the king owing to the power of their noble adversaries."[42] After the conclusion of the Elizabethan era, however, there were jurists who were prepared to argue that the court could do the king's bidding in other ways.

William Lambarde, a close associate of James's Chancellor Lord Egerton, argued that the Star Chamber had a jurisdiction to punish those guilty of defrauding the monarch "in their lawful prerogative."[43] He believed, like Bacon, that it included an extraordinary dimension as "there have been some few matters meet, which have been reserved to a higher hand and have been left to the aid of an absolute government and authority."[44] Egerton, who was described by the constitutionalist lawyer and parliamentarian James Whitelocke as "the greatest enemy of the common law that ever did bear office of state in this kingdom,"[45] became the president of the Court of Star Chamber *ex officio* in 1596 and appointed Lambarde as his chief deputy.[46] Lambarde served in that capacity until 1617, the year Coke was dismissed from office, at the beginning of a period of intense conflict over the prerogative.

Egerton was replaced by Francis Bacon, who would then implement his own expansive theory of the Star Chamber's jurisdiction. He believed it had powers similar to that of a Roman censor, who in his view "had a moral jurisdiction over the citizens' public and private lives."[47] Like Lambarde, Bacon envisioned the Star Chamber becoming a court of criminal equity that could punish things the king thought were wrong but were not proscribed by law.[48] Increasingly, the king's adversaries were being prosecuted in the Court of Star Chamber on that theory.

However, Bacon's tenure as chancellor, which included the presidency of the Court of Star Chamber from 1617–21, was a disaster. "Bacon, brilliant, greedy, pompous, cynical, and over-familiar with those he favoured, had been otherwise occupied than by the court's business ... Bacon had proven a weak judge ... [and] a corrupt

one."[49] In 1621, William Hudson noted in his treatise that under Bacon the Star Chamber had routinely asserted its right to punish what was not forbidden either by the statute or by the common law but that "which otherwise might prove dangerous ... although no constitution or law have been made for them."[50] Ultimately, this expansion of the Star Chamber's jurisdiction would be its undoing: after this was exploited to oppress constitutionalists, a backlash was inevitable.

The Court of Star Chamber under Charles became a key means for the punishment of dissidents, who were increasingly lawyers closely associated with the constitutionalist opposition to the early Stuart theories of their extraordinary prerogative. Lawyers were punished personally for what their clients had said as early as 1625;[51] Serjeant Ashley, who had provided John Selden with his arguments about habeas corpus in the *Five Knights' Case*, was ordered to submit privately to the lord chancellor on pain of not being permitted to practice law.[52] In 1630, John Selden and Oliver St John were charged with possession of a book that contained satirical arguments against the prerogative.[53] Frequently, ruinous fines were imposed on those brought before the court, which were generally paid in lieu of languishing in the Tower of London.

It is this historical context that best illuminates the important features of the Act Abolishing the Star Chamber, which, like the Petition of Right, begins with a recital of Magna Carta and the Six Statutes. It then proceeds to discuss the jurisdiction granted under the statutes of Henry VII, noting that the Privy Counsellors "have not kept themselves to the points limited by the said statute, but have undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted."[54] As the council's jurisdiction was used to "introduce an arbitrary power and government ... contrary to the law of the land and the rights and privileges of the subject ... [the Court is] clearly and absolutely dissolved."

This act also swept away the jurisdictions of some other prerogative courts and abolished the judicial powers of the Council Board: "If anyone be committed, restrained of his liberty, or suffer imprisonment, by the order or decree of any such court of star-chamber ... or by the command or warrant of the King's majesty, his heirs or successors, in their own person, or by the command or warrant of the council-board, or of any of the lords or others of his Majesty's

privy council," the statute required judges to release them on writ of habeas corpus.

The act instantiates a substantive principle of the rule of law, but as this was accomplished in an indirect manner, it is frequently overlooked. However, when we pay close attention to the historical context of this act, it becomes evident that the act also had the indirect effect of forbidding torture. This is not obvious from the text of the act but becomes visible when we understand that the authority of the Privy Council, in the form of the Council Board, was essential to medieval and early modern torture: it was the only body that issued warrants for detention in the Tower of London and racking.

As the "manifold mischiefs" and violations of the "liberties of the subject" associated with the jurisdiction of the prerogative courts and conciliar bodies it addressed are not enumerated, the act does not itself provide conclusive proof that it was the intention of Parliament to prohibit torture. The context of the act provides some evidence, however. The Privy Council's ability to order things that were considered repugnant to the common law was controversial by the early modern era, even if these powers were exercised sparingly and in cases where public opinion was squarely against the offender.

A key example of resistance to this power came shortly before the early Stuart era with the case of John Stubbs, a Puritan controversialist who wrote a pamphlet criticizing a possible marriage between Queen Elizabeth and François, duke of Anjou. The queen considered his rhetoric outrageous, as it speculated that she was infertile and questioned her authority in an inflammatory manner.[55] The Privy Council (sitting as the Council Board) ordered Stubbs imprisoned and his right hand cut off. Despite the fact that Elizabeth was popular and the fact that Stubbs' indecency was commonly considered repulsive, this act of mutilation provoked a backlash among both the legal community and the populace.

Robert Monson (then justice of common pleas) questioned the power of the Privy Council to impose this sentence and subsequently resigned his position.[56] Observers of the execution of this sentence were shocked; the crowd at the scene of Stubbs' punishment was "altogether silent, either out of horror of this new and unwonted punishment, or else out of pity."[57] Shortly afterwards, the common law judges sought to trim the powers of the Council Board to punish offenders,[58] but two key powers of the Privy Coun-

cil – to imprison and to order racking in the Tower of London – remained intact until they were stripped away by the Act Abolishing the Star Chamber (the former, explicitly, and the second, by necessary implication with the first).

Without a power of detention, no warrants to torture could be issued: the rack rusted away after the council lost its ability to send prisoners into its presence. It is clear from these facts that the act had the practical effect of abolishing torture, but more attention must be given to its context to demonstrate that it entrenched an absolute right not to be tortured. Ample support for this proposition comes from the debates on the bill that demonstrate that it was intended to establish the primacy of the common law – which had been firmly set against torture for centuries – above any other extant form of royal justice. The act was passed after a "long and serious debate" on the question of whether Parliament had the power to regulate the royal prerogative.[59] A robust defence of the king's authority was presented by the Earl of Manchester, who "'affirmed the King's prerogative to be so riveted and inherent in him that it could not be limited by any law.'"[60] The Earl of Essex responded that the constitutionalists had "laboured all the Parliament to make themselves freemen and not slaves, and to have an 'arbitrary court' as a continual scourge over them suited not with their liberties and freedom."[61]

Racking someone in the Tower of London on the order of the Council Board was deemed wholly inconsistent with these liberties; no one mourned or even drew attention to the passing of a practice that had long been considered unseemly. Four centuries later, it is possible to say, as Tom Bingham did in his reasons in *A v. Secretary of State*, that "from its earliest days the common law of England set its face firmly against the use of torture." The Act Abolishing the Star Chamber's removal of the competing original jurisdiction of bodies connected to the Privy Council was the triumph of the common law; it was also victory over torture. The substantive principle that it embeds into the Constitution of Canada has never been questioned, even if its source remains unclear to most jurists. In the event that proposals for torture warrants, of the kind advocated by Alan Dershowitz and others shortly after 9/11, resurface in a future crisis, locating the source of that protection might prove essential to its continued vitality.

The final set of substantive constitutional principles embedded into the English constitution before confederation were also

designed to prevent particular methods of destroying individuals by means of prolonged arbitrary detention and judicially imposed cruel and unusual punishments that exceeded what was allowed by law. By creating absolute rights against these abuses, the constitutionalists of the late Stuart era erected the final elements of the modern rule of law on the principle of constitutionalism embedded by the Petition of Right. These specific constitutional principles of the rule of law were embedded into it because the rights they protected had been proven essential to the preservation of any constitutional order. This occurred at the end of the late Stuart era, which witnessed a constitutional crisis that catalyzed the Glorious Revolution and, in so doing, set the terms of the constitutional settlement that Canada inherited at confederation.

5

The "Seal of the Constitution": The Glorious Revolution and the Modern Rule of Law

Thus at the Restoration, we may say, the general principles of the law were settled and needed no amendment; but events showed that they could be evaded.

William F.W. Maitland, *The Constitutional History of England*

Less than fifty years elapsed between the constitutional crisis of the early Stuart era and that of the late Stuart era, a period that witnessed a tumultuous interregnum and restoration that never quite succeeded in bringing the constitutional order to the *status quo ante* that existed prior to the execution of Charles I. The first crisis had yielded constitutional principles and absolute rights that protected against being subjected to extralegal emergency measures purportedly justified by the executive's power to act outside the constitution on the basis of necessity and that categorically prohibited torture. The second crisis yielded the final three substantive principles of the rule of law guaranteed by the Preamble of the Constitution of Canada, principles set forth in The Bill of Rights, 1689, and The Act of Settlement, 1701.

These principles continue to be of paramount important to the Canadian constitution today. In an era of transnational terrorism and the prevailing tendency of governments to prioritize security over rights, ability to limit and derogate from the Charter rights that protect against cruel and unusual punishment and guarantee the right to habeas corpus have become problematic, as the Harper government's treatment of Omar Khadr demonstrates. These actions, along with the Trudeau government's decision to introduce legislation that strips parliamentary privilege in national security matters, demonstrates the importance of the nonderogable and absolute rights created by the constitutional statutes of the late Stuart era. Finally, the principle of judicial independence recognized in the Act of Settlement (as it was recognized in the *Provincial Judges*

Reference) continues to be of paramount importance, as it allows for challenges to violations of these rights and provides the conditions of possibility for further recognition of the seven absolute rights embedded into the Canadian constitution at confederation.

THE BROAD CONTEXT OF THE BILL OF RIGHTS: JAMES II AND THE GLORIOUS REVOLUTION

The immediate historical backdrop to the crisis of the late Stuart era that led to the Glorious Revolution of 1689 begins with the accession of James II in 1685. The previous forty years had witnessed numerous developments, beginning with the trial for tyranny, treason, and murder in 1649 of Charles I and his public execution. However, his *de facto* successor Oliver Cromwell's failure to produce a durable constitutional settlement during the Commonwealth or the Protectorate meant that, after Cromwell's death, the legal history of what had taken place during the English Civil War and the Protectorate was treated as a nullity after Parliament invited the son of the king they had deposed and beheaded to return to the throne.[1] From 1660 to 1685, Charles II reigned; while his reign was controversial and frequently embroiled in disputes over the scope of his powers, a serious rupture between the monarchy and the constitutionalist opposition in Parliament did not occur until the accession of his younger brother.

Initially, James managed to obtain the cooperation of Parliament by forgiving those members who had previously argued for his exclusion from the line of succession. Instead, he turned his wrath on men of lesser means. The outrageous punishments imposed on the king's lowborn critics demonstrated that before the embedding of a constitutional principle that created an absolute right not to be subjected to illegal or excessive punishment – even if it was imposed after a trial that comported with the constitutional guarantees of due process – the government could still subvert the rule of law by silencing its critics, at least if it could rely on a dependent judiciary.

Most problematically, the monarch's ability to subject critics to extralegal punishment after state trials continued to extend even to members of Parliament. The case of Sir John Eliot was fresh in parliamentarians'memory during the late Stuart era. Eliot was a constitutionalist devoted to exposing Charles I's attempts to subvert the constitution by ignoring the Petition of Right. As pun-

ishment for what he said in Parliament, Eliot was convicted at the monarch's behest in the Court of King's Bench and died in the Tower of London. And if the courts for some reason could not be relied upon to send a man to prison, the late Stuarts relied upon their ability to imprison dissidents in the Channel Islands or Scotland, places to which, the monarchs argued, the common law courts' writs would not run.

Crises in which the existence of these powers were particularly dangerous were not long in coming; the first occurred only three months after James's accession. After crushing a rebellion led by the Duke of Monmouth in May of 1685, James attempted to reinforce his powers by creating a large standing army, of the type that had been used to enforce taxation during the Protectorate and earlier. This was contrary to the provisions of the Petition of Right, 1627, a fact that raised the issue of James's army to constitutional significance.

To implement his plan, James needed to resort to the use of his prerogative to exempt individuals from the effect of the laws so that he might appoint officials who were loyal to him – chiefly his Catholic coreligionists. In order to suspend the application of legislation that would disqualify them from office, James issued the Declaration of Indulgence, 1687. This required an assertion of an absolute prerogative of a type not seen since the days of Charles I: the Scottish version of the Declaration (known as the Scottish Declaration of Toleration) stated plainly that it had been issued "by our sovereign authority, prerogative royal, and absolute power, which all our subjects are to obey without reserve."[2]

James's downfall was catalyzed by two events in 1688. First, on 27 April he reissued the Declaration of Indulgence,[3] demonstrating that this assertion of the prerogative was to be a regular feature of his reign. When seven Anglican bishops petitioned the king to reconsider his policies, they were arrested and charged with seditious libel, a charge that had been created and defined by the Court of Star Chamber.[4]

Second, on 10 June a future Prince of Wales was born. The birth of another potential Catholic dynast led to the decisive act. On 30 June, seven grandees (later known as the Immortal Seven) invited William, the Stadholder of the Netherlands and husband of James's daughter Mary, to come to England to rule jointly with his wife.[5] William and Mary agreed, and on 10 October they memorialized the earlier commitments they had made to the Immortal Seven to

respect the constitution.[6] William then landed in England with an army on 5 November. James was soon captured in Kent, but he was allowed to flee to France two days before Christmas. Choosing to interpret his flight as abdication, Parliament offered the throne to William and Mary. This change of dynasty – and the new political settlement that created a constitutional monarchy that followed – is known as the Glorious Revolution.

The terms of the bargain that Parliament struck with William were soon enacted in the Bill of Rights, 1689 – formally, An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown – which explicitly restricted the royal prerogative. It also guaranteed certain rights to Parliament and the people, such as freedom of speech in the course of legislative proceedings and the right not to be subjected to cruel and unusual punishments or to excessive bail or fines. After some resistance, William accepted these limits on his regal power, which were largely congruent with the limitations on the powers he held in the Netherlands as the Stadtholder of the Dutch Republic. In part due to that reason, his reign was largely uneventful from the perspective of constitutional development.

The end of his reign was uneventful as well, in terms of crisis or conflict, but it did lead to significant constitutional development. William's death in 1702 led to a succession crisis in the Netherlands, as he died childless.[7] In England, by contrast, Parliament had intervened shortly before William's death to regulate the succession, this time by means of a more conventional legislative process and a straightforward assertion of its power to act. The smoothness of this transition to what we now consider constitutional monarchy was made possible by the positive reaction to the constitutional settlement of the Glorious Revolution in general and the Bill of Rights and the Act of Settlement in particular.

The Bill of Rights, 1689 had not specified what would occur if Anne died childless. Consequently, the Act of Settlement, 1701 expanded the line of succession to the descendants of Sophia, Electress of Hanover, who was James I's granddaughter and Anne's closest Protestant relative. This much is generally known, but it is perhaps less well known that the act also specified in further detail the relationships between the Crown and Parliament, the relationships between the Privy Council and Parliament in particular. Finally, the act closed loopholes that threatened the spirit of the principles that by now comprised a fully formed paradigm

of governance in accordance with the rule of law; most notably, it guaranteed judicial independence by mandating tenure during good behaviour (that is, until impeached) rather than at royal pleasure.[8]

THE BILL OF RIGHTS' AMPLIFICATION AND CLARIFICATION OF CONSTITUTIONALIST PRINCIPLES

The Bill of Rights was a response to the late Stuarts' exploitation of loopholes in the Petition of Right, 1627 that had failed to predict and foreclose all the ways in which the king could subvert the limitations on his powers that Parliament had imposed in the early Stuart era. The Bill of Rights placed the royal prerogative and the monarchs themselves unambiguously under the law. William was asked to accept the curtailment of his authority in exchange for the throne, and he agreed. Accordingly, the Bill of Rights did not attain its constitutional significance gradually, as Magna Carta had done – it outlined the foundation of a new order created by the Glorious Revolution, which we now call constitutional monarchy. Its binding nature was clear from the beginning; the Bill of Rights was not only the contract that ended a rebellion responding to a king's abuse of power, but it was also the consideration that the English people received in perpetuity for placing a new dynasty on the throne.

It was clear during the Glorious Revolution that William and Mary had only been offered the throne on condition that they agree to the terms later set out in the Bill of Rights. Before they were crowned, Parliament drafted the Declaration of Right. Members of Parliament debating it noted that William's claim to the throne depended on there being a clear legal basis for declaring James's abuses unconstitutional, as only this could justify William's invasion. Accordingly, the Declaration of Right (which later became the Bill of Rights) served to highlight and reinforce the constitutional nature of the statutes that the Stuarts had violated, from Magna Carta to the Petition of Right. It also made the exact nature of James's unconstitutional behaviour clear, focusing specifically on abuse of the prerogative, stating that James had "endeavour[ed] to subvert the ... laws and liberties of this kingdom ... by assuming and exercising a power of dispensing with and suspending of laws and the execution of the laws without the consent of Parliament." This argument depended on the constitutional status of

the Petition of Right and the principle of constitutionalism that it contained, as it was this instrument that had established that the prerogative was confined within constitutional limits, such that it could no longer be used to subvert the fundamental laws.

On 13 February 1689 the Declaration of Right was read in the House of Lords, and the Marquess of Halifax, speaking for all of the estates, asked William and Mary to accept the throne, an invitation that was subject to the constitutional restrictions of the documents cited in the Declaration. William, speaking for himself and his wife, "thankfully accepted" the offer. (In fact, however, they had already agreed to all its terms in a meeting with the committee that drafted it, which had been held in the Banqueting House at Whitehall, the building in front of which Charles I's scaffold had been erected. Indeed, Charles had stepped to his public execution out of one of that room's windows.)

William and Mary swore – pursuant to the Coronation Act, 1689, which also remains in force today – an oath responding to this question put by the archbishop at every coronation that followed: "Will You solemnly Promise and Swear to Govern the People of this Kingdom of England ... according to the Statutes in Parliament Agreed on and the Laws and Customs of the same?"[9] This replaced the oath used previously, in which the monarch promised to reign "by the Law and Ancient Usage of this Realm," which the Stuarts had claimed included an extraordinary or absolute prerogative. The new oath made it clear that the statutes were the operative restraints on the prerogative; it acknowledged Parliament's power to trim the prerogative by statute whenever the winds of change require.

The Bill of Rights is itself a statute that narrowed the royal prerogative. It reinforced Magna Carta and the Six Statutes with a provision forbidding excessive bail, excessive fines, and cruel and unusual punishments. It reaffirmed the Petition of Right's conclusion that taxes levied with the consent of Parliament were illegal, and it banned prosecutions for bringing petitions to the monarch. It guarded against reversion to arbitrary rule by requiring the king to call regular Parliaments, which were explicitly given oversight power, as this was "for redress of all grievances, and for the amending, strengthening, and preserving of the laws."

As a constitutional instrument responding to the exploitation of loopholes in the Petition of Right, the Bill of Rights did not establish many rights that were entirely novel. What was without precedent

in earlier constitutional instruments was its creation of rights that could be asserted against the judiciary, which had been exploited as a tool of royal power since the early Stuarts had purged the constitutionalists, including Coke and Eliot, from the bench.

THE SCOPE OF THE RIGHTS CREATED BY THE PRINCIPLE AGAINST ILLEGAL OR EXCESSIVE PUNISHMENTS

Of the rights first set out clearly in the Bill of Rights, two persist in Canada as the unwritten constitutional principles of our constitution, having survived statutory reform until the point of confederation: the proscription of excessive bail, excessive fines, and cruel and unusual punishments and the parliamentary privilege that protects its members from prosecution for what is said in Parliament. As is the case with the principles embedded in every statute of constitutional significance, the scope of the rights they protect can best be determined by reference to the historical context of their creation, in the manner employed by Lord Bingham.

Clause 10 of the Bill of Rights states that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." The first two clauses appear self-explanatory, while the third is perplexing, at least without reference to the historical context, which demonstrates that the clause "was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties."[10]

The historical context that led to the recognition of this principle is best illustrated by the infamous case of Titus Oates. Oates – a full-time scandalmonger and sometime clergyman who had dared to threaten James in 1681 with implication in a far-fetched Catholic conspiracy – was convicted in 1685 in the Court of King's Bench of perjury, allegedly on the orders of a newly crowned James II. For having falsely sworn evidence about a Catholic conspiracy to kill Charles II, Oates was defrocked, made to stand in the pillory, and sentenced to be whipped through the streets, over a course of two whole days. The first whipping would take place as he proceeded east across the City of London, from Aldgate to Newgate, and the second from the edge of the City to Tyburn, the traditional site for the execution of traitors. The first whipping was so severe

that he had been expected to die before its completion: "That Oates should have been enabled to outlive it seemed a miracle."[11]

James received numerous entreaties to suspend the second flagellation, but he withheld his mercy. As a result, Oates's "miserably swollen" back was torn to shreds by the flaying he received on the road to Tyburn. Oates credited his survival to a prison surgeon, but he noted that the plasters applied to his wounds were torn off by his jailors, who acted in the king's "most gracious name."[12] It appeared to many that James simply wanted Oates dead; as perjury was not punishable by death, necessity gave birth to gruesome ingenuity. This suspicion was bolstered by the fact that Lord Chancellor Jeffreys had said from the bench that Oates "deserved more punishment than the laws of this land can inflict."[13]

Capital punishment was not available when the accused was convicted under the Elizabethan Statute of Perjury.[14] Accordingly, the lord chancellor relied on a theory of the court's inherent powers to craft what he thought was a suitable punishment at sentencing. Jeffreys's argument mirrored typical Stuart theories of the extraordinary prerogative. However, here it is the judiciary and not the executive that claims to have an implicit power to do what it deems necessary; it was an ally of the government that enlarged the scope of its own powers to better serve that government, not the government itself. For that reason, Jeffreys's sentencing of Oates only offended against the spirit of the Petition of Right, not the letter of it.

Clause 10 of the Bill of Rights contains a specific constitutional principle to prevent future such enlargements of judicial power, although the meaning of the word "unusual" has frequently been a source of misunderstandings. The original draft of the Bill of Rights prohibited "illegal and cruel" punishments, and John Somers – the most likely draftsman – wrote that his intention in framing this clause was to eliminate the "horrible and illegal" punishments imposed by late Stuart courts. For Somers, the horror of these unusual punishments stemmed from the fact that they were not specifically authorized by statute, not the fact that they were bizarre or exceptionally sanguinary. As horrible as the spectacle of Oates's whipping was, its effect on others at the time needs to be considered in the context of the early modern era and its tolerance of brutality; the disembowelling of traitors was not removed from the statute books until 1814, while the theoretical possibility of beheading and quartering persisted until after confederation.[15]

Arbitrariness is a principle most lawyers understand intuitively, in every era. The principle at the heart of the prohibition of excessive bail and excessive fines is that legal processes should not be used primarily to harm individuals in a manner that exceeds the spirit of the penal laws: legal punishment must serve a purpose rather than being an end in itself. Where the sanction has no justification, it is arbitrary, which typically is considered sufficient to render it unconstitutional. This is why, for instance, bail is posted in order to ensure that an individual will return to face charges; it must not be intentionally punitive.

This substantive constitutional principle of the rule of law created an absolute right not to be subjected to cruel and unusual punishments or excessive fines or bail; this nonderogable right continues to serve as a backstop to the derogable provisions of the Charter that proscribe these evils. Its continued importance can be best demonstrated with reference to cases that implicate what, both in the seventeenth century and today, have a nexus to reasons of state. The most recent example of this dynamic in Canada was the Harper government's opposition to the granting of bail to Omar Khadr, a Canadian citizen who as a fifteen-year-old was apprehended by American forces, detained, tortured, and sexually assaulted at a CIA-controlled black site in Afghanistan and later held and convicted by a military commission at Guantanamo Bay.

After being repatriated to Canada, Khadr was granted bail in the amount of $5,000 by a justice of the Alberta Court of Queen's Bench pending his appeal.[16] The government appealed unsuccessfully against his release, arguing that his release would cause irreparable harm to Canada; in the media, the minister of Public Safety claimed that Khadr's release would damage the nation's relations with the United States. The weakness of the government's case for continuing his confinement in Canada was exposed when the Supreme Court of Canada – in a rare judgment handed down orally from the bench directly after the arguments – unanimously rejected the government's position.[17] However, had Khadr been denied bail, his appeal to the Supreme Court would likely have centred on the Charter protections that mirror the protections of the Bill of Rights, but which are subject to limitation and derogation.

The language of clause 10 of the Bill of Rights was the model for section 2(b) of the Canadian Bill of Rights and section 12 of the Charter. The Supreme Court of Canada has interpreted these instruments to contain a principle of proportionality that creates

a right not to be subjected to punishment or bail conditions that are "so excessive as to outrage standards of decency."[18] According to Peter Hogg, this "may be an absolute right. Perhaps it is the only one" recognized by the Charter;[19] if true, this would make this unwritten constitutional principle of the Bill of Rights largely redundant. Unfortunately, it appears that the law officers of the Crown do not agree. If Khadr had been denied bail, the sort of political climate that would produce such a decision would mean that, on appeal, Khadr could expect to face arguments from the Crown about the limitation or derogability of his rights. The Crown's position would have been plausible on its face, as section 1 of the Charter is now thought to be inimical to absolute rights.

Despite that fact that section 12 of the Charter is subject to section 1, it is difficult for many to conceive of how a "grossly disproportionate" punishment might be held nonetheless to satisfy the *Oakes* requirement of proportionality.[20] Since 2017, however, we need no longer imagine it, as the government did in fact make this argument. In a case where victim surcharges (a fine by any other name) were imposed on indigent defendants unable to pay them, the Crown asserted that this is a permissible limitation of the Charter right not to be subjected to excessive fines,[21] which, as it is protected by section 12, was previously thought to be absolute. Accordingly, the question of the proper scope of the right recognized by article 10 of the Bill of Rights remains much more than academic.

If section 12 of the Charter does not create an absolute right but is instead subject to limitation and derogation, the backstop protection of the unwritten constitutional principle found in clause 10 of the Bill of Rights is the only absolute protection against the imposition of unwarranted judicial punishment in a crisis, such as the denial of bail to those whom the executive might be attempting to silence. For this reason, it will be necessary for lawyers to determine the proper scope of the principle, by recourse to the historical context of its enactment.

It should be noted that even in the overheated political atmosphere of the October Crisis, approximately half of those ultimately charged with crimes were released on bail: had this been unreasonably denied, the constitutional principle embedded in the Canadian constitution by the preamble and clause 10 of the Bill of Rights would have protected them. During serious public emergencies, the right not to be unreasonably denied bail is protected by the right

to petition for habeas corpus (discussed below), which also protects against torture by eliminating incommunicado detention and involuntary disappearances.

HISTORICAL EVIDENCE OF THE SCOPE OF THE CONSTITUTIONAL PROTECTION OF PARLIAMENTARY PRIVILEGE

The historical context of the Glorious Revolution demonstrates that none of the constitutional principles of the rule of law restraining the executive would have been embedded by the statutes of constitutional significance if Parliament itself had been successfully intimidated from implementing its constitutionalist agenda during the crises discussed in this volume. During the constitutional crises of the Stuart era, one of the most dangerous tools of governmental repression was politically motivated prosecutions and the punishment of members of Parliament. Accordingly, article 9 of the Bill of Rights explicitly recognized that the right of parliamentarians to speak freely in the course of debates without fear of punishment is constitutional in nature. Therefore article 9 entrenches that right: "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." The historical backdrop of the Bill of Rights demonstrates that article 9 was a direct response to attempts by the Stuarts to punish members of Parliament for what they had said during parliamentary debates over the prerogative. The key example that illustrates it was the case of Sir John Eliot.

Almost two hundred years prior to the Bill of Rights, Strode's Act, now called the Privilege of Parliament Act, 1512, was passed by Henry VIII's second Parliament. It stated that "suits ... [concerning the] present Parliament or that of any Parliament hereafter ... shall be for any bill, speaking, reasoning or declaring of any matter or matters concerning the Parliament to be commenced and treated of, be utterly void and of no effect."[22] Despite this, Eliot was brought before the bar of the Court of King's Bench in 1629 on charges of conspiring to disrupt the king's peace that stemmed from his vigorous advocacy in Parliament. Eliot had been the most stalwart defender of the rule of law, and he had consistently challenged Charles I's theory of an extraordinary prerogative, including his power to exempt his officials from its provisions (in particular, to protect the infamous incompetence and venality of Charles's favourite, the Duke of Buckingham) and, most recently, his power to

impose taxation contrary to the provisions of the Petition of Right. The Court of King's Bench – now purged of constitutionalists like Coke – held that the Parliamentary Privilege Act, 1512 had only been intended to protect Richard Strode personally. This tendentious interpretation only highlighted the degree of control over the judiciary that the Stuarts had achieved since Coke's dismissal.

After Eliot was sentenced, he was confined in the Tower of London. Eliot died there in suspicious circumstances; his total destruction and the king's vindictiveness is highlighted by the fact that he remains buried in the cemetery of St Peter ad Vincula, the chapel of the Tower of London, where he was placed after James refused to allow Eliot's wife to take possession of his body. It was this chilling example of the suppression of parliamentary debate that, more than any other event, stimulated subsequently the explicit recognition of the constitutional status of the substantive principle of parliamentary privilege. After the Restoration, Parliament attempted to pass legislation to establish that Strode's Act was a general law that protected all of its members. Identical resolutions passed in both Houses in 1667 stated that Strode's Act's provisions for indemnification were merely a recognition of fundamental law, in the form of the "ancient and necessary Rights and Privileges of Parliament," which protected every member "for any act touching all bills, speaking, reasoning, or declaring of any Matter or Matters in and concerning the Parliament."[23]

The struggle over the meaning of Strode's Act after the Restoration provides the historical context necessary for us to determine the meaning and contemporary scope of the requirement that "the freedom of speech and debates ought not to be impeached or questioned in any court or place out of Parliament." This is not merely immunity from prosecution for what is said in the course of debates. Rather, it extends, as was at issue in Strode's Case (as it was understood in 1667) to the preparation of bills, discussions between members about such proposed legislation and anything else that is necessary to the preparation and passage of legislation, whether this involves spoken or written communications.

In 1993, the Supreme Court of Canada asked in the leading case on parliamentary privilege, "[C]an our legislative bodies function properly, clothed only with those powers expressly conferred by our written constitutional documents?" Writing for the court, Chief Justice McLachlin noted, "The answer to this question must, in my view, be negative. The importance of the unwritten consti-

tutional right, for example, to speak freely in the House without fear of civil reprisal, is clear."[24] As the court has also concluded that "Parliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected," it is essential that the history of how legislative independence was actually achieved not be neglected when inquiring into the necessary features of this unwritten constitutional principle, as the scope of this principle is currently at issue.

In 2017, Canada's National Security and Intelligence Committee of Parliamentarians Act[25] was enacted. It contains a controversial section that strips parliamentarians who serve on this committee of their ability to assert the defence of parliamentary privilege if they are prosecuted by the government under the Security of Information Act. These parliamentarians are in a position to learn of serious abuses committed by Canada's intelligence agencies in the course of their duties; if they reported what they learned back to other members of Parliament or senators (even in closed and confidential meetings of the national security committees), they would now face criminal prosecution for doing so.

A constitutional challenge to this section of the act was filed in 2018; were this provision to be upheld, it would mark a fundamental change in the relationship between Canada's branches of government. Since the constitutional settlement imposed after the Glorious Revolution and the development of responsible government (as will be discussed in the next chapter), the government has been responsible to Parliament and not vice versa. Parliamentary privilege is essential to the preservation of that line of accountability; without it, the government can interpret the scope of its own powers (especially, although not exclusively, in the area of what it labels national security); members of Parliament who learn about these abuses and who raise them in Parliament can be prosecuted, for the first time in more than 300 years. Thankfully for those who challenge this unprecedented violation of the unwritten constitutional principles that create a right to freedom of speech and debate, the last interlocking protection recognized as a constitutional principle of the rule of law created and preserved an independent judiciary.

THE ACT OF SETTLEMENT: JUDICIAL INDEPENDENCE AND ITS PROTECTION FROM THE EXECUTIVE

A provision to secure judicial independence had not been included in the Bill of Rights because its provisions purported not to create but merely to recognize the ancient liberties of England's fundamental law that the Stuarts had infringed. Wishing to avoid resistance from William, as Tom Bingham writes, "it was decided that the bill ... should confirm old rights and not create new ones."[26] The next opportunity to revisit this issue occurred when it appeared that Queen Anne would die childless, which necessitated another alteration of the constitutional settlement.

The sections of the Act of Settlement, 1701 that regulate the line of succession remain part of the laws of the Commonwealth realms, but these provisions were modified by the Succession to the Crown Act, 2013 (and analogous legislation), which, *inter alia*, eliminated male-preference primogeniture. Conversely, the section that embeds the substantive constitutional principle that guarantees judicial independence remains intact and unmodified. This provision reads: "Judges Commissions' [shall] be made *Quam diu se bene Gesserint* and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them."[27] This explicitly establishes three requirements: first, that judges are to be appointed for life, and not at the monarch's pleasure; second, that they are to hold office during good behaviour, that is, subject only to being removed for cause by process of impeachment in Parliament; and third, that they have fixed salaries.

The question raised in 1998 in the *Provincial Judges Reference* turned on the scope of the unwritten principle of judicial independence that these directives were designed to implement. Provincial court justices were increasingly being subjected to control by commissions that set (and reduced) their salaries and set their working conditions. The premier of Alberta (Ralph Klein, sometimes facetiously known as "King Ralph")[28] had also opined publicly that a judge who complained about this state of affairs should be "very, very [sic] quickly fired." The independence of these judges by virtue of their institutional position was not protected by section 11(d) of the Charter, while the Constitution Act, 1867 did not address provincial judges at all but only judges appointed pursuant to sections 96–100, that is to say, justices of the superior courts.

Chief Justice Lamer noted in the *Provincial Judges Reference* that the text of the Act of Settlement did not create an absolute guarantee that judicial salaries would not be reduced. However,

he did note that Canadian political and judicial institutions are fundamental to the basic structure of our constitution, and on this basis he held that "governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy."[29] Accordingly, any power to regulate the courts and judicial salaries "contains within it an implied limitation that the independence of those courts cannot be undermined."[30] The chief justice's conclusion that the scope of the principle is wider than its three specific provisions was entirely correct – although this is only obvious if the historical context of this unwritten constitutional principle of the rule of law is understood. It is a simple matter to demonstrate from the backdrop of the Act of Settlement that it had a broad purpose: to prevent the manipulation of the judiciary by the executive that had plagued the Stuart eras. Without this, the protections of the Bill of Rights would be tenuous; it prohibited the illegal punishments that had been imposed by sycophantic judges, but if judges could be fired and hired at will, the judiciary would be loath to recognize that illegality.

It is instructive to consider the case of the judge who sentenced Titus Oates to be whipped to the point that his death was expected: George Jeffreys, who was known as James II's hanging judge after he presided over the Bloody Assizes of 1685. His path to becoming lord chief justice had been cleared by the Stuarts' removal of a number of independent judges from the Court of King's Bench, beginning with Coke and continuing, closer to Jeffreys's time, with Sir William Wilde, Sir William Dolben, and Sir Francis Pemberton, who – unlike the lord chief justice – had tried to save the innocent victims of Titus Oates' perjury from the gruesome fate of being hanged, drawn, and quartered.

By protecting the judges from dismissal by royal writ, the framers of the Act of Settlement sought to insulate the judiciary as it then existed from political pressure. The principle that it protects must be as broad in scope as necessary to achieve that purpose. Accordingly, Chief Justice Lamer's conclusion that the scope of the principle should guarantee impartial provincial court judges is entirely congruent with the historical context. As Bingham noted, "a truly independent judiciary is one of the strongest safeguards against executive lawlessness."[31] That was what concerned Parliament in 1701 and concerns us today, even if the impingement on independence is indirect. While premiers of Canadian provinces do not normally call for judges to be fired, and prime ministers of Can-

ada do not normally "publicly criticize" a chief justice of Canada in the manner seen in 2014,[32] this behaviour is aberrational because the constitutional principle of judicial independence has been vigorously defended by the Canadian courts. Without a defence informed by the historical context of this substantive principle of the rule of law, the absolute right that it guarantees to every Canadian – the right to a trial supervised by a truly independent judge – would only be a thing of the past.

THE PERFECTION OF HABEAS CORPUS: CONSTITUTIONAL ENTRENCHMENT OF THE RIGHT TO THE WRIT

The Habeas Corpus Act, 1679 entrenches the last of three vital substantive and nonderogable rights into the constitution of England and, by extension, that of the United Kingdom and Canada. Kings were restrained from killing their enemies by the Magna Carta; the Act Abolishing the Star Chamber effected the total and categorical elimination of the practice of torturing them. Habeas corpus prevents the government from destroying its enemies and dissidents by subjecting them to prolonged or indefinite arbitrary detention.

By 1701, the right to petition for the writ of habeas corpus had been enlarged and protected repeatedly, and by virtue of the Act of Settlement it was entrenched within the constitutional order imposed by the Glorious Revolution. However, the writ's history extends back to the thirteenth century, close to the horizon of "time out of mind": that is to say, the right to petition judges for writs related to confinement have a legal basis that extends back to the reign of Henry II. While the Great Writ had a long and complex history in the English courts prior to the seventeenth century, it was only due to the legislative enactments of the Stuart eras that it became a constitutionally entrenched source of protection against arbitrary imprisonment.

Around the time that the Six Statutes were defining the meaning of due process, the common law courts began to issue writs of *habeas corpus ad subjiciendum* to jailers for the purpose of examining whether or not their confinement was lawful. The use of the writ to challenge confinement on the order of the executive began to test the limits of royal authority in the late sixteenth century: first, the Court of Common Pleas held that the authority of a single Privy Counsellor was an insufficient rationale for continued confinement;[33] next, in *Search's Case*, the court held that the same

was true even when the order was signed by the monarch herself.[34] However, detention could still be authorized by the Privy Council as a whole, as long as the council sent a response to the writ that specified their reasons for ordering confinement *per speciale mandatum* (i.e., when they sent a return that specified the facts that supported their conclusion that detention was necessary, rather than a "general return" that cited only their authority).[35]

As relations between royal governments and the judiciary deteriorated throughout the reign of James I, the precise limits of this power quickly became a contentious issue. Coke, as lord chief justice, issued the writ in order to release petitioners who had been committed to confinement by the lord chancellor. After Coke was dismissed, he was instrumental in drafting the Petition of Right, which contended that the right to habeas corpus was guaranteed by Magna Carta and that any petitioner's release must be ordered if lawful cause for confinement could not be demonstrated.

The *Five Knights' Case* challenged Charles I's view that the invocation of his purported extraordinary prerogative over matters of state – a general return, contrary to *Search's Case* – must be considered sufficient legal cause for confinement. Constitutionalist lawyers such as Sir John Dodderidge claimed this was "the greatest cause that ever I knew in this court."[36] The outcome was ambiguous, but Charles's attempt to falsify the court record after the fact demonstrated that this issue would remain contentious. When Charles signed the Petition of Right, 1627, he conceded that he could not ordinarily warrant imprisonment without specifying the cause. However, as noted in the last chapter, Charles continued to assert that the Petition of Right could not limit his *absoluta potestas:* against the assertion of absolute power, the Great Writ was initially thought "too flimsy to support judicial action,"[37] in part because at that time judges who granted the writ could still be intimidated or dismissed by the king.

Parliament revisited this issue at the earliest opportunity: after Charles' personal rule (which ran from 1629 to 1640) ended, it was at the forefront of the legislative agenda of the newly called Long Parliament. The Act Abolishing the Star Chamber, 1640 is also known as the Habeas Corpus Act, 1640 since it specified that the writ must be issued even if the confinement is ordered by the king or the Privy Council, and any judge who receives a petition from someone held on such a warrant shall "bring or cause to be brought

the body of said party ... into open court ... and shall certify the true cause of such his detainer."[38]

There were still loopholes in this legislation; after the Restoration, the late Stuart monarchs were not loath to exploit them. Shortly after arguing in public that Parliament should not be prorogued (as this was the typical way in which Stuart kings had set up a period of rule by decree), Francis Jenks, a linen draper and Whig activist,[39] was sent to jail on 24 June 1676; Charles II and his Privy Council had issued precisely the type of detention warrant that the Act Abolishing the Star Chamber had specifically forbidden. As the courts did not sit in the long summer vacation between Trinity and Michaelmas terms, it was unclear whether any judge had the power at that time to issue a writ of habeas corpus to examine the cause of Jenks's confinement. Accordingly, Jenks's release had to await the fall, until after the chief justice informed the king privately that his imprisonment was unlawful: this ordeal "had enriched English liberty by his hot summer in jail."[40] In an era when "gaol fever" – that is, the epidemic typhus common to early modern confinement – was usually fatal, Jenks's fall release was cold comfort for England's constitutionalists and nonconformists, as "imprisonment until the next term of court could be equivalent to a death sentence." John Howard wrote a century later that typhus killed one-fourth of England's prisoners annually.[41]

Shortly before Charles prorogued Parliament in 1679, it passed the Habeas Corpus Act, 1679, then formally known as "an Act for the better securing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas" and sometimes called the Habeas Corpus Enforcement Act. The historical context of this act, which remains in force, is essential to determining the meaning and scope of the Great Writ in the modern era. After reciting numerous complaints of irregularities and evasions, the act authorizes the granting of habeas corpus when courts are not in session. It also specified that the writ would run to the king's special jurisdictions, such as the Channel Islands. This provision was essential to protect those dissenters most likely to be imprisoned for reasons of state: a number of early Stuart dissidents, including "Freeborn" John Lilburne – whose whipping and mutilation on the orders of the Star Chamber prefigured the abuse administered to Titus Oates – had been imprisoned at his majesty's pleasure in Mount Orgueil Castle, on the Island of Jersey.[42]

The substantive principle that guarantees habeas corpus has always been considered nonderogable. Paul Halliday, after describing the various acts that have been inexpertly described as having suspended access to the writ during the seventeenth and eighteenth centuries, argued that they demonstrated the existence of broad agreement that certain rights protected by the writ were not subject to derogation: "Crucially, no statute known as a suspension of habeas corpus ever 'suspended' the writ of 'habeas corpus.'"[43] Instead, these acts authorized the executive to issue warrants for the arrest and detention of individuals suspected of treason for a short and precisely specified period. They further specified that those held pursuant to such orders could not be granted bail. As Halliday notes, "[j]udicial practice and statutory language show that the suspension statutes did not in fact prevent supervision of detention by judges. Rather, they constrained judges' authority to release prisoners who had been jailed in specified ways ... the common law writ persisted throughout ... even during suspensions."[44]

While these acts created a precedent for short-term preventative detention without probable cause, then, they also reaffirmed the existence of absolute constitutional limits on the government, since "henceforth extraordinary powers could only be conferred on the executive by Parliament and for such time and in such manner as Parliament pleased."[45] Furthermore, any extraordinary powers so conferred were subject to detailed provisions specifying the form and manner of judicial review. Accordingly, even prisoners held on these warrants after the passage of these acts could bring suits alleging that the warrants contained technical defects – a claim that resulted in the release of twenty-three prisoners in 1696 held on warrants from the Privy Council or other royal officers after temporary detention was authorized by Parliament in the wake of the Jacobite assassination plot.[46]

Summarizing "suspension practice" of the seventeenth and eighteenth centuries, Halliday notes that, "First, suspension could only be ordered by Parliament. Given the disrepute attaching to royal suspension of statutes before 1688 [pursuant to the dispensing power], no one argued thereafter that statute [the Habeas Corpus Act, 1679] could be suspended by any but statutory means. Second, parliamentary suspensions were always for a fixed, brief, period. Third, the common law writ persisted throughout, ready for use ... even during suspensions."[47] The existence and availability of a judicial writ that preserved court authority over determin-

ing whether the basis and conditions of the detention were legal, even during suspensions, demonstrates the broad purpose of the principle that animates the Habeas Corpus Act, 1679.

WHY A BROAD PRINCIPLE THAT HABEAS CORPUS CREATES RIGHTS REMAINS ESSENTIAL IN CANADA

Despite the fact that more than 300 years have passed since the right to the writ entered into our constitutional order, it remains of vital importance. During the October Crisis, the cabinet issued emergency Orders-in-Council pursuant to the War Measures Act on 15 October 1970. Four hundred ninety-seven people were detained on these orders, the vast majority of whom had no connection to the kidnappings but who ostensibly would participate in or support a provisional government: this list included the leaders of the labour movement in Montreal, civil rights activists, and prominent artists and writers.[48] These orders stated that the detainees could be held for twenty-one days; some were initially held without being provided access to counsel and in some cases, completely *incommunicado*, until members of the bar in Montreal prevailed upon the government to allow them to visit these detainees. Virtually all of the serious abuses reported subsequently (chiefly, but not exclusively, casual cruelty by jailors) relate to that short initial period when there was no access to counsel, during which time detainees had no ability to challenge their conditions of confinement.

The existence of an absolute right to challenge one's detention remains essential even after the right to counsel and to petition for habeas corpus were included in the Charter, as the government could invoke the notwithstanding clause in an emergency or make an argument predicated on the limitations provision of section 1. However, the absolute right to petition for habeas corpus in Canada has a broad scope, commensurable with the broad purpose that animated the embedding of the substantive principle into the constitution. Anyone in confinement must be afforded the opportunity to challenge the legality of their commitment, even during emergencies. Additionally, legislation and orders authorizing preventative detention must have a definite time specified for the termination of custody – they must not be open ended. This right was described by Lord Bingham in *A v. Secretary of State* as being founded on the "requirement of temporariness."[49]

In an age in which governments insist serious emergencies caused by terrorism are certain to occur, it is essential that the absolute rights that serve as a firewall against involuntary disappearance and torture be preserved. Judges can rely on the historical context of the writ's emergence and reinforcement when concluding that its principles should be interpreted broadly and meaningfully.

THE SEAL OF THE CONSTITUTION: THE ACT OF SETTLEMENT STABILIZATION OF FUNDAMENTAL RIGHTS

The Whig lawyer and historian Henry Hallam concluded that the passage of the "act of settlement was the seal of our constitutional law" because at that moment "the battle had been fought and gained."[50] The peace treaty between the Crown and Parliament created an executive accountable to the laws and required to govern within them. In response to the constant pressure exerted by arbitrary authority, which threatened at any moment to burst through any flaw in the laws that sought to restrain it, the rule of law was built. Every constitutional statute was erected in or directly after a crisis, in response to some breach or new tension that threatened to destroy the entire structure of constitutional governance. Each shored up the dyke against the pressures of a rising tide of prerogative; had it burst, absolutism would have swept away every legal limit on political power.

In the course of the construction of this durable constitution that spanned half a millennium, these rights acquired a significance that is hard to fathom from our late modern vantage point, much as we cannot appreciate the significance of Gothic cathedrals to the cities that built them. The same is true of its builders: suffice it to say that those who had fought and bled for them were seen as somewhat more than heroes, if somewhat less than saints – even if they were clearly also scoundrels, like Titus Oates. The best among them – particularly Edward Coke – entered into an English pantheon of liberty, which within decades would have devotees across the oceans.

The English constitution had followed its colonialists across the Atlantic, and the Glorious Revolution had reverberated from Massachusetts Bay to Jamestown and beyond, including to points north. The meaning that the Fathers of Confederation assigned to the phrase "a Constitution similar in principle to that of the United Kingdom" would depend on how its principles would be inter-

preted over the next two centuries, particularly in the colonial political struggles to come.

PART THREE

Transplanting the Rule of Law: Bending in New Winds of Change

PREFACE TO PART III

The framers' understanding of the British constitution and its importance to the preservation of rights, rather than merely as a framework for government, was the product of the colonial history of British North America; as was the case with every constitutional statute discussed to date, it reflected a settlement that was implemented after the resolution of a constitutional crisis. In this case, the essential historical backdrop to the constitutional statute (here, the Constitution Act, 1867) is the constitutional crises that occurred during the struggle for responsible government. These began with the rebellions of 1837–38 and ended with the passage of the Rebellion Losses Bill (Lower Canada), 1849.

The victory of the Great Ministry of Louis-Hippolyte LaFontaine and Robert Baldwin in 1849 was over the Family Compact, the oligarchy famously described by Lord Durham, then governor general, as "a petty corrupt insolent Tory clique." This victory is well known for implementing responsible government and toppling an oligarchy, but it achieved far more than that. In much the same manner as those who brought about the Glorious Revolution in England, the moderate reformers in Canada managed to preserve and magnify the importance of all of the substantive constitutional principles of the rule of law, especially the guarantees of due process created by Magna Carta, the protections of the English Bill of Rights, the bar on prolonged arbitrary detention found in the Habeas Corpus Act, and the provision of an independent judiciary created by the Act of Settlement.

In essence, the history of the rule of law in British North America was a recapitulation of its development over the previous two centuries in England. Many of the first English settlers came to escape the religious persecution of the early Stuart kings, who

frequently subjected them to extraconstitutional punishment in the prerogative courts. For example, dissenters were frequently pilloried (and sometimes mutilated) for failing to take the *Oath ex Officio* in the Court of High Commission and to confirm they had taken communion in the manner required by the Church of England, the state religion. Many of these forms of persecution were eliminated by the Act Abolishing the Star Chamber. However, these burgeoning colonies were deprived of the benefits of the constitutional settlement of the Glorious Revolution, which allowed for continued arbitrary governance by the imperial authorities that recalled the worst excesses of the Stuart eras.

After the American Revolution, the governors in what remained of British North America enshrined the British constitution at the heart of the new political order, but this purportedly faithful imitation was hollow at its core: the constitutional principles of the rule of law did not constrain the colonial governments in any way, especially during emergencies. Roughly a decade before the triumph of responsible government, the governments of Upper and Lower Canada responded to rebellions by imposing martial law, subjecting even moderate and constitutionalist opponents of the oligarchical regimes to prolonged arbitrary detention, treason trials before corrupt judges (or at drumhead tribunals), and cruel and unusual punishments.

Many of the victims of this repression were lawyers, who had been at the forefront of the struggle to realize and implement the constitutional principles of the rule of law over the previous two centuries. The Canadian legal profession was transformed by this struggle; in response to Tory hypocrisy about the British constitution, the lawyers of the middle classes embraced the views of the moderate opponents of the Family Compact and the Château Clique, particularly those of Robert Baldwin's father, William Warren Baldwin, who had helped to transform the Law Society of Upper Canada from a nursery for young oligarchs into a hotbed of constitutionalism.

The constitutionalists' comprehensive successes in government after 1849 meant that during the two decades before confederation there was a consensus in Canada about what the British constitution guaranteed, which persisted through confederation. The moderate reformers defeated the Loyalists so thoroughly that their constitutionalist perspective became so ingrained as to require no argument and to pass without notice. The battle over the con-

stitution in the wake of the Rebellion Losses Bill, 1849 was short and sharp but only because the preparations had been extensive: constitutionalists had been present in North America for two centuries, holding firm to their line of march, despite the many twists and turns on the path to confederation. It is this history – which recently has sometimes appeared to be at danger of being forgotten – which we must recover in order to understand precisely how the specific principles of the rule of law found in the constitutional statutes of the United Kingdom entered into the Canadian constitution. Owing to the gradual decline of the lack of attention to legal history within constitutional interpretation in Canada – a trend which is hopefully being reversed in the twenty-first century – the danger of losing our awareness of these substantive principles and why they are essential to the preservation of any constitutional order worthy of the name is ever more real.

6

The History of Constitutionalism in North America and the Canadian Settlement of 1849

This province is singularly blessed, not with a mutilated constitution, but with a constitution which has stood the test of experience, and is the very image and transcript of that of Great Britain.

John Graves Simcoe, first lieutenant governor of Upper Canada, 1792

The creation of British colonies in North America was not a straightforward extension of imperial authority, at least when considered from a constitutional perspective; the fact that the majority of the early colonists were constitutionalist dissidents subjected to religious persecution by the executive before the Glorious Revolution influenced the political and constitutional development of British North America. The Puritans' opposition to the late Stuarts was not only religious in nature; they also adhered to a particular form of constitutionalism, which meant that the struggle for the rights at the heart of the constitutional settlement of 1689 would be waged on both sides of the Atlantic, although in different ways and at different times.

In 1620, as related by the foundational American narrative, a group of Puritan separatists from Nottinghamshire known as the Pilgrims established the Plymouth Colony, in what is now Massachusetts. They were joined in 1629 by the nearby Puritan settlers of the Massachusetts Bay Colony. In 1630, the Great Migration began, and this continued until the English Civil War broke out in earnest in 1642. By that time, the population of the English colonies on the mainland of North America was approximately 50,000, with almost four-fifths of these being Puritan smallholders.

After the restoration of the monarchy in 1660, dissenting Protestants were again subjected to significant repression in England. The oppression of the Puritans between 1661 and 1672 – between the Restoration and the events that impelled the Glorious Revolu-

tion – was another significant impetus to the growth of the North American colonies. This, combined with a high birth rate and a relatively long life span, led to a population explosion. Between the English Civil War and the Glorious Revolution, the colonies grew from 50,000 to 200,000 people.

By moving to a remote corner of the emergent empire, the earliest settlers did manage to achieve something very close to independence from the burgeoning Stuart royal authority. This remoteness also encouraged a parallel constitutional evolution. From the beginning the law in the colonies was explicitly predicated on what the constitutionalist opposition in Parliament would have called fundamental law. The colonists, being seventeenth-century constitutionalists, believed in mixed government of the type outlined by Fortescue and shunned absolutism. For instance, "the Massachusetts [Bay Colony] charter was considered [by the colonists to be] a written guarantee of civil and political liberties ... just as these same Puritans thought of the Magna Carta as a general guarantee to all Englishmen, themselves included, of civil liberties."[1] The Restoration caused no immediate disturbance to the constitutional order of the colonies, but late Stuart claims of absolutism reverberated on both sides of the Atlantic.

CONSTITUTIONALISM IN THE THIRTEEN COLONIES BETWEEN TWO REVOLUTIONS

When news of the Glorious Revolution reached the American colonies, the colonists seized the opportunity to strike back at those whom they considered the agents of arbitrary executive power and the violators of their own ancient liberties. Revolutions against the royal governors flared up quickly in Massachusetts, New York, and Maryland. "Elsewhere, there were varying degrees of protest and rebellion. Connecticut and Rhode Island, for example, quickly filled the political vacuum created by overthrow of the administrations imposed by James; they quietly resumed their old forms of government."[2]

The influential Puritan preacher Increase Mather was sent by the Massachusetts Bay Colony to greet William and Mary after their coronation and to implore them to restore the colony's liberties, as James's royal governor had imposed what Mather termed a "French Government," taxing them without their consent, depriving them of town meetings, arbitrarily seizing their property, and leaving the

country in a "bleeding state."[3] His mission was successful, and the colonial charters were restored. From the Glorious Revolution until the French and Indian War of 1754–63, the colonies were effectively self-governing; the colonists prospered under the regimes they had reestablished after having been given leave to implement the revolutionary settlement of 1689 in North America.

The population of the mainland colonies doubled between 1701 and 1715, doubled again by 1749, and redoubled by 1765. They grew comparatively rich, and they began to diverge culturally and socially from the United Kingdom. The thirteen colonies were considerably more egalitarian because the concentration of wealth in the hands of industrialists in eighteenth-century Britain fostered a considerably more restricted franchise and rampant political corruption.[4] Lawyers – whether members of the gentry or not – enjoyed a considerably higher status in the colonies than they did in England: legal training was associated with social mobility and political prominence.[5] North American law students were either apprentices or autodidacts; all budding lawyers focused their limited resources on obtaining and studying the Books of Authority, of which the most important was Coke's *Institutes;* later, it was Blackstone's *Commentaries*, which was sold in remarkable quantities from its first publication in North America.

The *laissez-faire* relationship between imperial officials and the colonial assemblies soured when the United Kingdom decided that the colonies should pay the costs of the French and Indian War and of their continued defence. In response to stiff resistance to what was understood to be taxation without representation (which colonists argued was contrary to the provisions of Petition of Right and the Bill of Rights), in 1774 Parliament passed the Coercive Acts:[6] these appeared to violate the same substantive constitutional principles, but the Declaratory Act, 1766 had established that these constitutional guarantees did not bind Parliament when legislating for the colonies.

The Declaratory Act was, therefore, an implicit and preemptive suspension of the constitution. It also protected the hated practice of taking those colonists caught evading import duties (which they held to be contrary to the Petition of Right) to Halifax, Nova Scotia, for trial in Vice Admiralty Courts, which were presided over by judges who received a portion of the value of the allegedly smuggled goods they seized. This in particular was held by numerous colonial lawyers – and future statesmen – to be contrary to Magna

Carta. Accordingly, the nonderogability of constitutional rights became the key rallying point for the revolutionaries, at least until independence necessitated new theories and a new constitution. As Edward Mims described the colonial reaction to the Declaratory Act: "[I]t was greeted with an outcry of horror in the colonies. James Otis and Samuel Adams in Massachusetts, Patrick Henry in Virginia and other colonial leaders along the seaboard screamed 'Treason' and 'Magna Carta'! Such a doctrine, they insisted, demolished the essence of all their British ancestors had fought for, took the very savour out of that fine Anglo-Saxon liberty for which the sages and patriots of England had died."[7] While the intellectual origins of the American revolution were varied, "What ... shaped it into a coherent whole, was the influence of ... the radical social and political thought of the English Civil War and Commonwealth period the colonists identified with these seventeenth century heroes of liberty."[8]

Prior to the Declaration of Independence, the American revolutionaries had insisted that they were defined by their opposition to violations of what Blackstone had labelled the absolute rights of British subjects: George Mason argued that "We claim nothing but the liberty and privileges of Englishmen in the same degree, as if we had continued among our brethren in Great Britain."[9] As late as 1775, the revolutionaries continued to profess their loyalty to King George III and the good old constitution, arguing that the king's ministers and the "new system of statutes and regulations adopted for the administration of the Colonies" were responsible for the discord.[10]

Professions of loyalty to the Crown and the constitution were also necessitated by the fact that roughly a fifth of the population of the thirteen colonies were firmly against waging war for independence. Many of these colonists – a significant portion of whom later became United Empire Loyalists – agreed with the constitutionalist grievances but not with a revolutionary solution. The *Declaration of Independence by the Loyalists* published in New York in 1781 is an exemplary statement of their ideology: "The unsuspecting confidence which we with our fellow citizens reposed in the Congress of 1774, the unanimous applause, with which their patriotism and firmness were crowned, for having stood forth, as the champions of our rights, founded on the English constitution; at the same time that it gave to Congress the unanimous support of the whole continent, inspired their successors with very different

ideas, and emboldened them by degrees to pursue measures, directly the reverse of those before adopted."[11] This, and many statements like it, demonstrate that both the revolutionaries and the Loyalists claimed to be fighting for the rights guaranteed by the constitution of the United Kingdom, until these were replaced a new constitution,[12] which the United Empire Loyalists rejected.

THE LOYALIST EXODUS TO THE CANADAS AND THE EXECUTIVE'S NEW OLIGARCHIES

To understand the importance of constitutionalism in the political struggles in British North America during the nineteenth century adequately, it is essential to bear in mind that the majority of the migrants who moved north in the wake of the American Revolution were not extreme Tories (a political faction originally formed from the opponents of the constitutional settlement of the Glorious Revolution) but moderate constitutionalists. Accordingly, their views on the constitutional statutes that this volume discussed in the previous three chapters – especially Magna Carta, the Petition of Right, the English Bill of Rights, and the Act of Settlement – defined the later constitutional crises in Upper and Lower Canada.

During the Revolutionary War and its immediate aftermath, 40,000 British subjects, later known as United Empire Loyalists, fled the United States of America. Some three-quarters of the exodus from the northern states came to Nova Scotia, where there had been no rebellion owing to a substantial British military presence. Approximately 10,000 refugees came to the Province of Quebec, where they joined a population of *Canadiens* governed under the terms of the Quebec Act, 1774; its guarantees of freedom of religion to Catholics had secured popular support for British colonial authority during the American invasion of 1775. The remainder of the United Empire Loyalists came to Upper Canada and settled the Niagara Peninsula and what is now Prince Edward County. The population of the Canadas increased steadily during the early nineteenth century in the same manner as the thirteen colonies in the seventeenth, and for similar reasons. Lower Canada had a very high birth rate, while Upper Canada witnessed a continuous influx of immigrants from both the United States and the United Kingdom, although this was interrupted by the War of 1812.[13]

In the wake of the American invasion, the imperial authorities (the governor general of British North America in Quebec and the lieutenant governors of Lower and Upper Canada, residing at Montreal and York [now Toronto], respectively) followed a policy of reinforcing their control over the political process by creating a new class of landed gentry in Upper and Lower Canada, known as the Family Compact in the former and the Château Clique in the latter, with whom the executive allied itself to cement its power over the colonies. As is well known to students of Canadian history, this alliance, which depended on substantial amounts of patronage and generous contractual arrangements controlled by the governors, dominated the political and social landscape of the Canadas between 1814 and 1848. However, as the oligarchical base upon which the governments of this period supported themselves was so narrow, anything that resembled political agitation led to disproportionate repression.

This much is common knowledge. But the events of those years are also part of the story, less well known, of how the dominant understanding of the constitution of the United Kingdom in the Canadas was transformed between 1812 and 1867. This was catalyzed by the transformation of the colonial legal profession from one dominated by the oligarchical elites – who espoused Toryism – to one responsive to a broader middle class, whose ideas about law and politics were defined by seventeenth-century constitutionalism above all. The elites' glorification of the British constitution proved to be their downfall in the end, as their repression proved to be hypocritical and their loyalism purely opportunistic.

THE REBELLIONS THAT CLEARED THE FIELD FOR THE CANADIAN REFORMERS' CONSTITUTIONALISM

To understand how constitutionalist ideas became central to colonial politics and ultimately to the constitutional settlement that defines the backdrop of confederation, it is essential to grasp how the social engineering of the imperial authorities was ultimately doomed by their self-serving and hypocritical interpretation of the British constitution, which increasingly ran counter to the constitutionalism of the middle-class population. The critical point of contact where the friction was generated related to the protections accorded by the specific principles of the rule of law as the constitution was applied in the colonies. The elite and the middle-class held

divergent and at times even antithetical views about these protections' significance.

When John Graves Simcoe took up his position as the first lieutenant governor of Upper Canada in 1791, his chief concern was to create a distinct society from that of the United States. The key difference would, in his view, be the existence of a true aristocratic class on this side of the border. He believed in an established church – the (Anglican) Church of England – and a landed gentry that would govern in close cooperation with imperial officials. A tight-knit group of reputable quasi-aristocratic families that monopolized public office would, in his view, be essential in a colony that suffered from ineffective and sometimes absentee governors, who either suffered through long and incapacitating illnesses once arrived or failed to take residence in British North America at all.

As a result of Simcoe's policies, in both Upper and Lower Canada, a burgeoning middle class chafed under an oligarchy that hoarded all opportunities for advancement, whether public or private. The elite of both colonies controlled the banks, the law societies, the judiciary, and the executive councils that advised the colonial administrators (thereby controlling patronage). This meant, for example, that only the children of prominent families were considered eligible for legal education, normally the first rung on the ladder to political, commercial, or bureaucratic careers of significance, since success in these careers depended on proximity to imperial officials. Elections to the legislative assemblies remained relatively free, but the assemblies were routinely ignored by the governors, despite (or rather, because) they were the most democratic institutions. The exclusion of religious and national minorities from every path to power was also essential to maintaining this status quo.

During the War of 1812, both colonies were invaded, and the prospect of what now might be termed a "fifth column" of seditious insiders provided a justification for repression, and as Americans sought to immigrate in ever-larger numbers, the repression continued. Maintaining control required openly oppressive measures, including the executive's rigging of Upper Canada's elections in favour of the Tories in 1836 and ignoring the ninety-two resolutions of the Legislative Assembly of Lower Canada for three years and governors ruling by decree. After these legislative safety valves were closed off, an explosion was inevitable.

In Lower Canada, plans for an insurrection were accelerated by Governor Sir John Colborne's decision to arrest the leaders of the Patriote party, which represented the broad Quebecois middle class, on mere suspicion of revolutionary intent. As they fled, rebellion broke out in the countryside, particularly in Saint-Denis, where a rebel force led by Wolfred Nelson defeated British regulars. This caused general alarm among the colonial executives, as reinforcements from the United Kingdom would have taken months to arrive, at best. Once virtually all of the troops in Upper Canada were in transit to Montreal, the journalist and republican agitator William Lyon Mackenzie launched a rebellion in Toronto. While rebel forces in both colonies were soon crushed, guerrilla raids were launched from the United States led by Anglophone "Hunter Patriots" in Upper Canada and "Frères Chasseurs" in Lower Canada. In response, martial law was declared in Lower Canada. Following a string of military losses and a crackdown across the border, the rebellions were defeated in late 1838.

While the repression of political opposition after 1838 resembled the aftermath of the War of 1812, there was a critical difference: most Canadians resisted the American invasion, but during the rebellions a significant number neither supported the rebels nor aided in their repression. Like many of their emigrant forefathers, these Canadians abhorred both the abuses of the colonial authorities and the act of taking up arms against them. After 1838, there was now a party that represented this constituency: the moderate reformers, who had rejected both the unconstitutional measures and the violent response.

In both colonies, the moderate reform movement was led by lawyers. Having been educated at the law societies by prominent constitutionalists – like William Warren Baldwin – who had been excluded from the Family Compact but whose wealth and education made their outright exclusion difficult, these erstwhile pupils understood even before the rebellions how constitutionalist principles could be used to appeal to an oppressed middle class and built their political platforms accordingly. This new generation of lawyers in Upper Canada had refused to support Mackenzie, but they had been appalled by the treatment of his followers by the colonial authorities. (Many became reformers in the course of defending the rebels in their treason trials that followed – for example, the then-Tory barrister George M. Boswell presented a politically charged defence in the trial of the former mayor of York; Boswell

subsequently became an ally of Robert Baldwin; then, after the victory of 1849, a bencher of the Law Society; and ultimately a judge, serving in that capacity until long after confederation).[14] In Lower Canada, even the cream of the legal profession could not avoid the rebellion or take a wholly neutral position towards its abuses, as they too had been arrested, held without charge, and denied habeas corpus. In the aftermath of the rebellions, constitutionalists in the legal profession were well positioned to use constitutionalist grievances to carve out a space for moderate reform and to gain significant support from the broad political centre in both colonies.

RESISTANCE TO MARTIAL LAW AND THE DENIAL OF HABEAS CORPUS IN LOWER CANADA

The imperial authorities' blatant disregard for the specific principles of the rule of law that were central to the constitutional settlement after the Glorious Revolution – particularly the right to habeas corpus, the right not to be subjected to illegal punishment, and the right to enjoy the protections of an independent judiciary – were to have remarkably far-reaching and significant effects in the decades that followed. In Lower Canada, the colonial administrators had relied on the harshest methods to crush the rebellion, and when these failed, they departed from every norm of the constitution of the United Kingdom, without remorse.

This repression began with the unconstitutional suspension of habeas corpus. Governor Colborne's attempt to suspend the writ without proper legislative approval quickly ran into difficulties because of constitutionalist opposition from two justices, Phillipe Panet and Elzéar Bédard. John Teed, an American-born tailor, had been arrested for high treason on the governor's own warrant; his lawyer Thomas Cushing Aylwin petitioned for habeas corpus, and the justices issued the writ. When Colborne refused to order Teed's release, Panet and Bédard attached his jailor for contempt of court, precisely as the Habeas Corpus Acts had required. The governor general responded by removing these justices from office, which was at minimum contrary to the spirit of the principle of judicial independence embedded by the Act of Settlement.[15] Justice Joseph-Rémy Vallières de Saint-Réal issued another writ of habeas corpus when sitting in Trois-Rivières, in favour of Célestin Houde, a farmer from Rivière-du-Loup. In a "remarkably traditional" judgment that resembled the arguments of the seventeenth-century Whig law-

yers Sir William Williams and Sir Thomas Fleming, he held that "personal liberty is a natural right."[16] Colborne suspended him as well.

The justices did not passively accept their suspensions. They had the support of many of their colleagues: Justice Jean-Roch Rolland expressed his support to Bédard, "praising his intelligence and his courage in the face of manifest illegality."[17] Bédard travelled to London on Boxing Day, 1838 to defend his conduct. On the advice of the Colonial Office, he, Panet, and Vallières de Saint-Réal were reinstated by Governor Charles Thompson, Lord Sydenham. Their rulings on these writs were printed and circulated in Quebec, while in the United Kingdom several commentators vouched for the correctness of their arguments.[18]

The writs of habeas corpus issued during the Lower Canada Rebellion threatened the executive because they exposed the constitutional infirmity of the personal rule that followed the dissolution of the Legislative Assembly. Additionally, as the Bill of Rights was then interpreted, if the courts remained open, then the operative rationale for martial law was not present. However, if the courts remained sitting and martial law was imposed, it was clear that the government's true objective was to "justify [an] abridgement of the common law courts,"[19] precisely the evil that its framers had sought to prevent. This principle of constitutionalist thought had not been weakened between the time of the Glorious Revolution and the revolutions of 1837–38. To the contrary: "[F]rom the end of the eighteenth to the end of the nineteenth century [that is, until after confederation], British legal thought and jurisprudence would maintain this restrictive interpretation of martial law. Thus, the tradition established by Edward Coke, Matthew Hale, and William Blackstone was followed and strengthened, while recourse to martial law was increasingly confined."[20]

Governor General Colborne's declaration of martial law on 4 November 1837 was deficient in every respect when judged against these metropolitan norms. First, it was issued by proclamation, making it an executive rather than a legislative act. Second, the Court of King's Bench continued to sit without much difficulty in Montreal, Quebec City, and Trois-Rivières: accordingly, it was evident that "the uses of martial law had little to do with an actual emergency. The measure simply ensured that the executive would have the means to intervene rapidly in any future troubles without relying on slow and cumbersome legal procedures."[21] On this basis,

even the law officers of the Crown in Lower Canada had concluded that "the establishment of a court-martial was illegal."[22]

What was even more damning was the subsequent evidence of Colborne's intent, which demonstrated that he had imposed martial law in order to avail himself of extraconstitutional powers to suppress the rebellion, particularly military commissions and the death penalty. Those arrested in Lower Canada were brought before drumhead tribunals. Ninety-nine detainees were sentenced to death between 28 November 1838 and 8 May 1839.[23] Most of those sent to the gallows were selected by "arbitrary criteria," including whether they had been judged to be influential among their fellow Canadiens.[24]

Colborne's assault on constitutional rights and liberties put the legal profession of Lower Canada under direct fire, as the lawyers and judges who opposed it were considered enemies of the state. The right to counsel was severely restricted both in theory and practice: four detainees suspected of acting as rebel coordinators during the Guerre des Patriotes were told on 24 November 1838 that they would be court-martialled in four days, and "[o]nly after bitter discussion was permission to consult legal counsel given, such as it was: four of the most respected *Canadien* lawyers (Louis LaFontaine, the feared Charles Mondelet, and ... [the] Viger cousins) were being held in the prison cells above these detainees, having been arbitrarily arrested on 4 November on Colborne's orders."[25] These lawyers, who insisted vigorously on a trial at common law, remained in detention until May 1840; while imprisoned, their assertion of a right to trial by jury was brought before the House of Commons of the United Kingdom. Before Parliament they alleged that Colborne "furnished to enmity an opportunity of wreaking its revengeful feelings on the liberty of the subject ... The country was under military and despotic rule."[26]

ABUSES OF THE LAW OF WAR DURING THE UPPER CANADA REBELLION AND THE PATRIOT WAR

In the aftermath of the revolutions of 1837–38, members of the legal profession in both Upper and Lower Canada witnessed the importance of the principles derived from instruments as old as Magna Carta and as new as the Act of Settlement. Anglophone constitutionalists observed this from the vantage point of lawyers attempting to defend those subjected to the manifold abuses of the

executive, while those in the Francophone bar frequently saw it from the standpoint of those accused and deprived of due process or imprisoned without trial and denied habeas corpus. Yet their oppressors consistently represented themselves as upholding the constitution; consequently, both of these two groups of lawyers learned that a constitution without the specific principles of the rule of law is worthless.

The leaders of the Upper Canada Rebellion (at least those who were captured and who were British subjects) were tried for treason before juries, as they demanded, in proceedings that possessed procedural safeguards. There were, however, a number of extraconstitutional abuses perpetrated by the executive during the suppression of the Upper Canada Rebellion, which occurred for the most part outside of the courtroom.

One of the key figures associated with the shocking abuses of military authority during the rebellions was Colonel John Prince, who later became a prominent loyalist and antagonist of the moderate reformers. Angered by the fact that "two brigand 'generals' escaped the noose" after their trials,[27] by the summer of 1838 he "was growing increasingly frustrated with the cause of justice."[28] Six months later he had an opportunity to mete it out as he saw fit and ordered the summary execution of prisoners captured after the Battle of Windsor. These were not accomplished by means of firing squads in the ordinary way, which would itself have been an atrocity, but what was worse, "The simple fact of the shootings seems to have been generally approved of both before and after the battle; but telling a prisoner to run for his life before shooting him down, blowing a man's brains out just to make sure he was dead; dragging a wounded prisoner out of a clergyman's house and shooting him from horseback; and staging a shooting for the benefit of the audience on an American schooner – these were the acts not of a defender of the established order of things but of a madman."[29]

By the end of 1838 Prince was being portrayed as a "cowardly madman" in newspapers and pamphlets, not merely by patriot sympathizers but by his fellow colonels and magistrates who "may well have been motivated by humanitarian feelings and a desire to tell the truth."[30] Prince never denied ordering the killings, as he had expected praise and not censure. And in this he was not completely disappointed, for Tory papers did praise him; after several years of defending the murders they argued that "he is the very type of what an Englishman out to be."[31] Prince's reputation in loyalist

circles did not suffer even when he publicly horsewhipped one witness to the killings who had condemned him or when he wounded another (a deputy clerk of the peace) in a duel.[32]

A military court of inquiry absolved Prince of all fault, a verdict endorsed by Lieutenant Governor Arthur on 20 March 1839. Arthur then forced Prince's leading military critic, Colonel William Elliott, to resign his commission. Later that spring, the law officers of the Crown in Upper Canada, including Attorney General Christopher Hagerman (who, like Prince, had horse-whipped a political opponent, the reformer Robert Gourlay, who was then unconstitutionally denied habeas corpus and exiled[33] and who was a close friend of Governor General John Colborne) gave an opinion to the Executive Council that the executions were "perfectly legal."[34] Prince remained on the bench as a magistrate and was elected chairman of the court of quarter sessions that July.

Prince continued to enjoy all the fruits of being a well-connected member of the Family Compact owing to the dominance of that group over the affairs of the colony. Until the arrival of responsible government, the only official criticism of his conduct came from the United Kingdom, where there were still defenders of seventeenth-century constitutionalist norms in the legal profession and Parliament, such as the Whig statesman Lord Brougham. Rising in the House of Lords to denounce the opinion of the law officers of the crown in Upper Canada absolving Prince, the former Lord Chancellor Brougham argued that the attorney general's opinion absolving Prince was "the grossest outrage on all law that had ever been put on paper, not merely by a lawyer, but by the most ignorant man who had ever existed ... it was absurd and monstrous from the beginning to the end ..." Brougham also told the House that he had never come across a chapter entitled "On the anticipation of legal proceedings by summary execution" in such famous jurists as Hawkins, Blackstone, and East.[35]

Prince's prominent status in the Canadian judiciary after his infringement of the constitutional principle embedded by Magna Carta is the perfect illustration of the importance of the recognition of the unwritten constitutional principles of the rule of law to the generational transformation of values that was taking place within the legal profession.

THE MODERATE REFORMERS: A COALITION HELD TOGETHER BY WHIG CONSTITUTIONALIST VIEWS

The widespread revulsion within the lower ranks of the Canadas' legal professions provoked by the executive's unconstitutional abuses during the rebellions of 1837–38 and its failure to address them in the aftermath demonstrated how the bar had been transformed over the previous decades. During the ascendancy of the Family Compact, the legal profession had remained a small and tightly controlled group of well-connected loyalists; between 1821 and 1826 the law students' society was a "self-proclaimed schoolroom for Canada's governing class."[36] In 1824, Archdeacon (later, Bishop) John Strachan (who was also an arch-loyalist political mastermind) noted that "almost all the young men of eminence in Upper Canada and many in Lower Canada have been my pupils"; the vast majority of the young men he had tutored then became law students.[37] These pupils were then taught at the Law Society by Family Compact stalwarts such as D'Arcy Boulton, who was so reactionary as to be "useful to reformers such as Mackenzie as a symbol of the province's grievances."[38] During this period, law students from Osgoode Hall were antagonistic to reform. In 1826, a group of Osgoode students – sons of the Family Compact to a man – broke into the print room of William Lyon Mackenzie's newspaper *The Colonial Advocate* and destroyed his presses.

During the following generation, however, the dominant political orientation of the legal profession changed rapidly, owing primarily to an influx of middle-class law students who found the reformers' ideology considerably more attractive than that of the loyalists who would have excluded them. By 1849 the Law Society had swelled from twenty to more than 200 members. Its new members' views of the constitution of the United Kingdom and the relationship between the colonial executive and the legislative assemblies shifted from Tory to Whig.

Much of this transformation can be attributed to the influence of the great constitutionalist lawyer William Warren Baldwin, who served as the treasurer (the highest official) of the Law Society of Upper Canada from 1811 to 1815, 1820 to 1821, 1824 to 1828, and from 1832 to 1836. It is a simple matter to "locate Baldwin within the Whig tradition" and more specifically to identify statements that "invoked the solemn authority of Blackstone on liberty."[39] After 1828, Baldwin began to present his views on the constitution more pointedly; as more abuses of the Family Compact came to light, "Baldwinite constitutionalism [gained] popular appeal."[40]

Subsequent political abuses in the election of 1836 – including gerrymandering and the hiring of Orangemen to mob polling places – set the groundwork for the next phase of the reform movement,[41] especially for the moderate reformers who, unlike republicans such as William Lyon Mackenzie, could present their agenda in the familiar terms of the protection of the absolute rights of British subjects protected by the constitution of the United Kingdom, which they argued had been ignored by the imperial authorities both before, during, and in the aftermath of the rebellions. Canadien members of the bar in Lower Canada – of which Louis-Hippolyte LaFontaine was now the leading light – played a similar role in the development of the moderate reform movement (known as the Parti Bleu) in Montreal and Quebec City.

The Act of Union, 1840 created the United Province of Canada out of the former colonies of Lower Canada and Upper Canada. While this was intended to marginalize Francophones, it had the unintended consequence of creating a cross-community moderate reform move-ment, led by LaFontaine and Robert Baldwin (William's son), who forged an enduring close friendship and indissoluble political alliance: when LaFontaine was deprived of a seat in the Legislative Assembly owing to gerrymandering in Terrebonne, Baldwin's allies made sure that LaFontaine was nominated for a safe seat in what is now Newmarket, Ontario.

The moderate reformers' ultimate goal was the creation of a system of responsible government that would create a relationship between the Legislative Assembly and the governor general that mirrored the terms of the compact between Parliament and the monarch created by the Glorious Revolution. They sought to restrict the royal prerogative to where it could only be exercised on the advice of ministers who enjoyed the confidence of legislature; under Lords Metcalfe and Cathcart (that is, from 1843 to 1847), governors general continued to bend the legislature to their will, using extraconstitutional repression when necessary.

THE REBELLION LOSSES BILL, 1849, AND THE TRIUMPH OF REFORMER'S CONSTITUTIONALISM

Robert Baldwin and Louis-Hippolyte LaFontaine came to power as the joint premiers of Canada West and Canada East after the reformers won the elections to the Legislative Assembly of the Province of Canada in 1848. Governor General Lord Elgin was willing

to accept the principle that he would take advice exclusively from a cabinet that was responsible to the Legislative Assembly and not withhold royal assent from any duly enacted legislation. While the Great Ministry (for so Baldwin and LaFontaine's government was termed) is normally associated with recognition of the principle of responsible government, close attention to the events of 1849 demonstrate the importance assigned by the moderate reformers to the recognition of the substantive principles of the rule of law.

The new government's desire to achieve the recognition of these constitutional principles was soon put to the test, as it quickly introduced the Rebellion Losses Bill (Lower Canada), 1849. This legislation set up an indemnity fund for those who had suffered property damage during the Lower Canada Rebellion (a similar fund had been set up for Upper Canada five years earlier, without controversy). The bill caught the Tory opposition by surprise; the bill had not been discussed in Elgin's throne speech, and it appears that even very well-informed officials (including the premier's cousin Robert Baldwin Sullivan) had heard nothing in advance;[42] the members of the new cabinet had held their cards very close to the vest, and for good reason. The bill was explosive.

During the debate over the Rebellion Losses Bill, the moderate reformers indicted the Family Compact for violations of the absolute rights recognized by the substantive principles of the rule of law. These included deprivation of habeas corpus and the imposition of martial law; they also decried violations of the laws of war and the abuse of the royal prerogative contrary to the principle of constitutionality recognized by the Petition of Right. In response, the Tories bristled against the reevaluation of the constitutionality of their conduct during that crisis, which in their view turned the moral hierarchy upside down.

Opposition to the bill was led by Sir Allan MacNab. His claim to membership in the oligarchy was firmly rooted in his military service against those whom he considered traitors; crucially, he was also an Anglican scion of a loyalist family. As a fifteen-year-old boy, MacNab achieved distinction for bravery in battle against the American invaders at Fort Niagara during the War of 1812. He then followed the *cursus honorum* for aspiring members of the Family Compact, first as Strachan's student, then studying law under D'Arcy Boulton, then qualifying as a barrister in the year of the Types Riot – when the students of the Law Society destroyed Mac-

kenzie's presses – the highwater mark for the Family Compact's control over the legal profession.

MacNab also played a leading role during the Upper Canada Rebellion, rushing a contingent of militia that he commanded from Hamilton to Toronto and leading the principal body of that force to Montgomery's Tavern, where they defeated the rebels in the first decisive engagement. Later, he was granted command by Governor General Francis Bond Head over forces in London and the Niagara Peninsula. At the conclusion of the rebellions, MacNab was knighted and named a King's counsel. For these reasons, he exemplified the Family Compact and the legal profession that it dominated before William Warren Baldwin: that oligarchy believed their victories over the rebels established their right to rule in perpetuity. The exposure of the unconstitutionality of its suppression during the debate on the bill would expose the hollow nature of that claim.

MacNab's opposition to the Rebellion Losses Bill was rooted in his beliefs that the actions of the loyalists in 1837 established their loyalty and fitness to rule, while the rebels had demonstrated that they deserved death, exile, or – at best – ignominy and grudging tolerance. His chief ally in the Legislative Assembly was John Prince. To the reformers, as we have seen, Prince was a "cowardly madman" who had executed prisoners in cold blood; he remained, at least in his own mind, a hero. Prince "jumped to his feet" when the bill was introduced, declaiming that "The people of Upper Canada would cut off their hands rather than pay these claims."[43]

Prince's reaction set the tone for the speeches in the Legislative Assembly during the debate over the Rebellion Losses Bill, which were astonishingly acrimonious even when judged against the standards of that era. This is unsurprising, given the personal involvement of many of the leading members of the Legislative Assembly on both sides of the conflict. Most of the organizers of the rebellions of 1837–38 had escaped the court-martials and treason trials by fleeing to the United States: in Upper Canada, these included reform-oriented lawyers who had entered politics, such as John Rolph and Marshall Spring Bidwell; in Lower Canada, this group included the great *patriote* Louis-Joseph Papineau and his Irish-Canadian right-hand man, Edmund Bailey O'Callaghan. By 1845, almost all of these who wished to return to Canada had obtained special amnesties from Lord Metcalfe. The only remaining holdout was Mackenzie, who refused to petition for readmission, as this required implicitly admitting to wrongdoing. He returned only

after the Amnesty Act, 1848, which did not require any admission of guilt.

As the Tories' principal objection to the Rebellion Losses Bill was that it would reward rebels, the question of the precise legal effect of the amnesty was crucial. One prominent member who was active in the debate had neither run away nor sought amnesty. Wolfred Nelson had been captured,[44] and he was held for seven months in Colborne's custody. He was not tried but instead exiled to Bermuda by Lord Durham after he replaced Colborne in May of 1838. Nelson never admitted guilt: he was proud of having "rebelled against colonial misgovernment."[45] He had returned to Canada after LaFontaine (then attorney general) entered a *nolle prosequi* to all charges pending against him.

In the Tories' eyes, Nelson was an unreformed rebel against the Crown, someone they could scarcely believe would be eligible for compensation after his property was burned by the British. His conduct in 1837 became a central point in the debate, and since he was a key member of the LaFontaine–Baldwin government, the loyalists' arguments were politically explosive. MacNab, Prince, and others raised the issue of whether Nelson was in fact responsible for the murder of Lieutenant George Weir, a courier who was either murdered in custody or shot while attempting escape by *patriotes* under Nelson's command in Saint-Denis. Nelson's response was devastating. He turned the tables on his accusers, setting new terms of engagement: "Those who call me and my friends rebels I tell them that they lie in their throats ... I tell those gentlemen to their teeth, that it is they and such as they, who cause revolutions, who pull down thrones, trample crowns into the dust and annihilate dynasties."[46] In the wake of this fiery broadside, and in order to secure the support of those who were wavering at the prospect of admitted rebels being compensated, Henry John Boulton introduced an amendment that would make ineligible those who had been convicted of treason.[47] In defence of the claims of the remainder, he argued that the military had been guilty of "indiscriminate arson" in 1838.[48]

Robert Baldwin then made it clear that he would not concede to further demands to disqualify others who had been punished without trials, such as Nelson, as "the ordinance under which they were transported was decidedly illegal."[49] Conversely, he noted the judgments of treason by the courts-martial "not being *yet* reversed" were valid, if dubious.[50] Notwithstanding Baldwin's veiled allusion

to future efforts to overturn the judgments of these bloodthirsty tribunals, Joseph Laurin complained that Boulton's amendment "invited us to sanction, and even to justify the atrocious and barbarous judgments of the court-martial."[51]

Following up on the issue of whether those convicted by unconstitutional tribunals should be deprived of compensation, solicitor general for Canada East Lewis Drummond praised the actions of the justices of the Court of Queen's Bench of Lower Canada who had issued writs of habeas corpus and prohibition in attempts to halt the courts-martial. In doing so, he endorsed their interpretation of the British constitution and denied the competency of the Special Council. Additionally, he argued that despite the fact that Boulton's amendment did nothing to endorse the courts-martial, "he hoped, nevertheless, that the time would come when these decisions would be reversed, but let it be done in the *constitutional way*," noting that "it was no business of the House to say who were guilty of high treason."[52]

Having the weak side of the legal arguments, the Tories began to play to a crowd that would soon devolve into a mob. In response to their insults, other members who had participated in the hostilities on the *patriote* side joined Nelson in accusing the Tories of being the true rebels, for being disloyal to the constitution of the United Kingdom. Using starkly constitutionalist language, Papineau referred ironically to "the loyalty of the Tories in Canada, such as it is ... Their behaviour during and since their taking up arms, demonstrates that they were unworthy of possessing power, like the virulence of the hatred which they exhale against constitutional liberty."[53]

In making the case that the Tories had rebelled against the constitution by supporting and sanctioning the use of illicit emergency powers, numerous members of the government made specific references to constitutionalist interpretations of the non-derogable rights of British subjects. In essence, they argued that the rebellion was excused by the unconstitutional actions of the executive.

James Hervey Price responded to MacNab's allegations of Francophone disloyalty by arguing that "those who by their misrule had provoked rebellion, were still more to blame. Those men had in a most arbitrary tyrannical manner turned the government into an oligarchy ... Our aim has been to establish here the British constitution in its purity and excellence. Their aim has been to establish

a despotism, more accursed than any other, for the despotism of an oligarchy is more unsatisfactory and more undignified than any other."[54] Insofar as the Tories' right to rule rested on the distinction between the "loyal" who fought "rebels," the rejection of this argument frequently resulted in abusive and unparliamentary language. Just as their arguments were beginning to inflame their supporters to a fever pitch (especially in Montreal, owing to the dominance of the loyalist press, in particular the vociferously Tory *Montreal Gazette*), all eyes turned to LaFontaine, who had been tarred personally with accusations of treason during 1837 by Prince and MacNab in the debate but who as yet had not responded.

For reasons that are lost to history, on 15 February 1849 LaFontaine was still not prepared to reply, and so the task of leading the final charge fell to the solicitor general for Canada West William Hume Blake who then delivered the most famous and influential political speech of the pre-confederation era.[55] After an initial volley by his fellow Irish-Canadian Francis Hincks, Blake blasted the Tories for causing the rebellions; more specifically, he blamed the rebellions on the Tories' willingness to ignore the British constitution when it suited them, defining this as a form of disloyalty, which made the "loyalists" the true rebels.

Blake's indictment of the Tories was not limited to the immediate prelude to 1837–38 but extended back to the formation of the Family Compact. He railed against abuses during the War of 1812, destabilizing the right to rule not only of figures like Prince but also men like MacNab. "It is probably not going too far to say that no speech ever delivered in a Canadian Parliament produced a more intense impression upon the hearers. In that tumultuous effort the pent-up wrath and indignation of fifteen years found vent."[56] As Blake reframed the constitutional history of the Canadas, "the Assembly became spellbound, and all felt that they were listening to speech destined to live in our Provincial History ... The baneful effects of the domination of the Family Compact were depicted in lurid colours, and the system pursued by the oligarchy was denounced in such language as only a man of strong feelings can command. Mr. Blake now undertook to show that there is such a thing as rebellion against the constitution, as well as rebellion against the Crown, and that the Compact to which Sir Allan belonged had for years violated the principles of the constitution."[57] His speech asserted the following:

> That loyalty, which is ever ready to extend and strengthen the prerogative of the Crown by stinting and limiting the liberties of the people, is not loyalty, but slavery. It ... must tend to weaken the allegiance of the people of this Province by depriving them of their rights as British subjects.
>
> But I confess I have no sympathy with the would-be loyalty of honourable gentlemen opposite, which, while it at all times affects peculiar zeal for the prerogative of the Crown, is ever ready to sacrifice the liberty of the subject. That is not British loyalty; it is the spurious loyalty which at all periods of the world's history has lashed humanity into rebellion ... The expression "rebel"' has been applied by the gallant knight opposite to some gentlemen on this side of the House, but I tell gentlemen on the other side that their public conduct has proved that they are the rebels to their constitution and country.[58]

This speech is constitutionalism at its finest, by the standards of any of its phases. It made pellucid that the LaFontaine–Baldwin government's vision of the constitution was grounded in the seventeenth-century consensus on the substantive principles of the rule of law. Its description of the rights and liberties of British subjects being abused by illegitimate extensions of the royal prerogative echoed from the time of the rebellion to the Stuart eras.

Blake's constitutionalist oratory resonated with Canadians in 1849 not because the colonists' ideology lagged behind the United Kingdom's. Rather, it was compelling because the political struggles in the colonies resembled earlier analogues in the mother country. Just as Canada attained responsible government at a later date than the United Kingdom, so it had struggled against an executive that ignored constitutional rights long after these issues had been settled in Britain.

Moreover, just as every substantive principle of the constitution of the United Kingdom had been won in the teeth of repression, the loyalist prerogative repudiated by the Rebellion Losses Bill would not go gently. This was foreshadowed by the Tories' supporters' immediate reaction to Blake's speech, which was to brawl in the galleries of the House of Assembly; women leapt from the balcony to the floor of the House, and the Legislative Assembly was adjourned. The next day, John A. Macdonald challenged Blake to a duel. The Speaker of the House was able to broker peace between them. Blake

was wise to keep his powder dry, as he would need it to defend both himself and Parliament within weeks.

THE MONTREAL RIOTS: SINCERE CONSTITUTIONALISM PUT IN PRACTICE DURING A MAJOR CRISIS

The Great Ministry's reaction to the lawlessness that would engulf the Canadas would demonstrate that their commitment to constitutionalism was genuine; their concern for the rights that had been abused during the rebellions at the height of the new crisis provides the clearest evidence. This scrupulous regard for the legal limits on their own authority even in the direst circumstances was the final step towards a new and durable constitutional settlement in the colonies.

After the Rebellion Losses Bill was passed by the Legislative Council on 19 March 1849, the loyalists redirected their efforts to persuading Lord Elgin to withhold royal assent. Central to their argument was an appeal to prevent mob violence: this would be the work of the Orangemen, whose rage the Tories had done so much to stoke during the debates. The Tories believed their strategy would succeed and that their constitutional theory of executive powers would be vindicated by "the arbitrary intervention of the Governor General over and against the confidence of the House."[59]

Elgin grasped the nature of the dilemma perfectly. In a letter to the head of the Colonial Office, he noted that "The Tory party are doing what they can by menace, intimidation and appeals of passion to drive me to a coup d'état."[60] Fortunately, he was determined to preserve responsible government in Canada, and in this he had the support not only of Earl Grey but also of Lord Russell, prime minister of the United Kingdom.

The confrontation that would ensue when Elgin stood firm proved decisive, transforming political relations for decades to come and establishing the constitutional paradigm to confederation and beyond. On 25 April 1849, he travelled from his official residence at Monklands to Parliament, the recently converted Marché Sainte-Anne at Place d'Youville. He then put his signature to forty-two new laws, including the Rebellion Losses Bill. That night, the riots began. A mob stormed the House of Assembly while it was in session, leading to a brawl in that chamber, which this time was not merely confined to the gallery. During the ensuing running battle, a storm of paving stones destroyed its windows and knocked

over a gaslight. Within minutes, the legislature was in flames. The Library of Parliament was destroyed, along with the entirety of the Archives of Canada, which had a collection that extended back to New France.[61]

As the Legislative Assembly quickly reconvened in the Bonsecours Market, the violence was far from over. The next night, the mob targeted the reformers' residences, paying special attention to those who had questioned the Tories' loyalty to the constitution, including Hincks, Price, Nelson, and the joint prime ministers, LaFontaine and Baldwin. When Elgin came to the Château Ramezay to meet Parliament on 28 April, his carriage was pelted with pieces of the pavement. Every window was broken, and Elgin narrowly escaped being stoned to death.[62] Rioting continued throughout the spring and summer. On 10 May, a delegation of reformers from across the Canadas was attacked at the Hôtel Têtu. (Blake defended them by shooting two rioters who broke into the hall.) Reports streamed in from Upper Canada of Orange Lodges and even regiments of militia that were planning to seize and take up arms against the government.[63] Baldwin and LaFontaine resisted every call to adopt unconstitutional or even harsh but legitimate emergency powers, relying exclusively on the common law rather than prerogative.

As the government's strategy of waiting out the unrest appeared to be succeeding, the erstwhile loyalists adopted a tactic that would seal not merely their defeat but their perpetual political irrelevance. Many Tories, who to date had predicated their claim to rule on their loyalty to the Crown, began to agitate openly for annexation by the United States. Having been spurned by the imperial authorities (who had supported the will of the majority of Canadian voters in accordance with the principle of responsible government), they proved ready to pledge their loyalty to the American nation.[64]

The Tories, who had never tolerated even the most loyal opposition, now made a show of feckless disloyalty: this palpable hypocrisy was, to almost every observer, seen as simply beyond the pale, promoting outright "revulsion against 'self-styled' or 'soi-disant' loyalists."[65] After the Annexation Manifesto, it was impossible to think of the loyalists as anything other than "so-called loyalists," as they had demonstrated that what the reformers had said in the debate over the bill was true: the Tories' loyalty extended only as far

as their wallet. "It was not the 'liberty bell but the cash register' that rang true in the Annexation Manifesto."[66]

While the core of the annexationist movement was located in Anglo-Protestant Montreal, Tories across the Canadas subscribed to it, and when it was crushed even "Upper Canada's old-time Toryism died a hard death in 1849, unrepentant to the last."[67] The LaFontaine–Baldwin government's response to the Annexation Manifesto was to give its signatories a stark choice: to recant or to suffer removal from every public office.[68] Accordingly, the reformers' political triumph encompassed the removal of all loyalist diehards from positions of influence in the legal profession; as the position of Queen's Counsel was technically a form of public office, barristers like John Prince were stripped of that title. This cleared the field for the reconfiguration of the judiciary and the law offices of the Crown in the reformers' own image – with lawyers whose allegiance was to constitutionalism. This became the generation of lawyers who would play a key role in confederation, including the drafting of the preamble to the Constitution Act, 1867.

THE RECOMPOSITION OF THE LEGAL PROFESSION IN THE ERA OF RESPONSIBLE GOVERNMENT

The transformation of the legal system after 1849 was profound. The triumph of the constitutionalists was sealed: those who trained lawyers, who served as the law officers of the Crown, and who sat on the colonies' benches would increasingly reflect the emergency consensus within the legal profession about the presence and importance of the constitutional statutes that had guaranteed the liberties that had been sorely abused by the executive between 1814 and 1848, especially during the rebellions. When the Magna Carta, the English Bill of Rights, and the Habeas Corpus Act were ignored with impunity, the importance in particular of an independent judiciary, as specified by the Act of Settlement, had been highlighted. It should be noted that the Baldwin–LaFontaine government was not merely making patronage appointments when it appointed reformist lawyers to the bench and to other senior legal posts in the wake of the crisis of 1849. Independent jurists who had defended Whig constitutionalist principles during earlier generations were remembered and rewarded.

To begin with appointments to the judiciary, Panet was appointed the year after the passage of the Rebellion Losses Bill to the

Quebec court of appeal. (Vallières de Saint-Réal had passed away after having been promoted to the position of chief justice of the Court of King's Bench in Montreal, the first Canadian to serve in that position; Bédard learned on his deathbed from LaFontaine that the government had obtained a favourable ruling from the Judicial Committee of the Privy Council on his behalf.) Thomas Cushing Alywin, who had obtained the writs of habeas corpus from Panet and Bédard, served as solicitor general for Canada East (as William Hume Blake's counterpart) and was later appointed a justice of the Court of Queen's Bench in Montreal, serving in that capacity until after confederation.[69]

The Baldwin–LaFontaine government also expanded the judiciary, creating many more opportunities for constitutionalists. This contributed to displacing and marginalizing the "loyalist" defenders of the Family Compact from the bench. A month after the Montreal Riots, the Great Ministry introduced the Judicature Acts, which created a number of additional places on the benches of courts of common law and equity.[70] Francis Hincks's ally Robert Easton Burns was appointed in late 1849 to the Court of Queen's Bench. In 1850, Robert Baldwin's cousin Robert Baldwin Sullivan was appointed a justice of the Court of Common Pleas. William Buell Richards, who served as attorney general in the succeeding government of Hincks and Augustin-Norbert Morin, was appointed to the Court of Common Pleas in 1853. After the reorganization and strengthening of the Court of Chancery, William Hume Blake was appointed the chancellor of Upper Canada. He was later appointed judge of the Court of Error and Appeal in 1864, serving in that capacity until after confederation.

Baldwin, Blake, and their reformist allies in the legal profession also played a significant role in reforming legal education in the era of responsible government. Blake served as the first professor of law at what later become the University of Toronto. In 1853, he was named chancellor of the University; he also remained active in the affairs of the Law Society and other educational institutions.[71]

After stepping down from government, Robert Baldwin served for almost a decade as the treasurer of the Law Society of Upper Canada, the longest uninterrupted term of office in that position to date (and surpassed only in total number of years in office by his father to that point). Baldwin was offered the position of chief justice of Canada West, which he declined owing to ill health; LaFontaine accepted the position of chief justice of Canada East in

1853 and held it until the year of the Charlottetown Conference, when he died in office. Baldwin died at the helm of the Law Society of Upper Canada. By that time, the moderate reformers' view of the British constitution and the substantive constitutional principles of the rule of law had become conventional wisdom. Loyalist views on this topic were never resurrected, even as government passed to a coalition of Baldwinite reformers and the nascent Liberal–Conservative Party, which was followed shortly by the Macdonald–Cartier joint premiership in 1857.

THE COMPATIBILITY OF ALL MODERATE POLITICAL FACTIONS BEFORE CONFEDERATION

In order to understand the vision of the constitution of the United Kingdom that explains the meaning of the preamble framed at confederation and the rule of law that it embedded into the Constitution of Canada, it is essential to consider that the political reform that followed the creation of responsible government in the Canadas is the Canadian equivalent of the constitutional settlement that had followed the Glorious Revolution. A new consensus about the meaning and importance of the constitutional statutes described in the last three chapters formed, as one view became dominant or rather as its opposite – absolutism – was destroyed.

The hard death of Loyalism provided Canadian students of the British constitution with numerous cautionary examples of those who rejected the new constitutionalist consensus; while most Tories abandoned both the idea of annexation and the discredited ideology of loyalism, some stubbornly chose the dead-end path. Unsurprisingly, John Prince took that road. Understanding that trajectory is essential to any explanation of why the alternative was considerably more attractive and why the moderate Tories adopted the moderate reformers' view of the constitution in the decade before confederation, becoming the Liberal–Conservatives who could join comfortably with the Parti Bleu in government.

Prince provides a clear example of "loyalism" in its purest form: a sense of privilege without responsibility, invoked to assert superiority over enemies both political and ethnic. Despite Prince's expression of contempt in 1849 for those who "glory in the name of Rebels and openly defend their treasons!,"[72] within months he became an active participant in the independence movement. While Prince did not hold public office, when his title of Queen's Counsel

was removed in 1851, this stinging rebuke to his sensitive ego led him to quit the legal profession. "He threw his silk gown to the four winds ... he was stung by the gratuitous insult offered him by sending him his dismissal [from the rolls] after he had tendered his resignation."[73]

Conversely, Sir Allan MacNab – Prince's close ally in 1849 – chose the broad and gentle road of moderation, which allowed him to remain active and prosperous in public affairs. After the Montreal Riots, he refused to condone the burning of Parliament and did not sign the Annexation Manifesto. More than anyone else before John A. Macdonald, MacNab was responsible for the creation of (what was to become) the Liberal–Conservative Party out of the ashes of the old Tories: "The obstreperous, arch-Tory element in MacNab was finally extinguished late in 1849 ... his moderate behaviour during the rebellion losses crisis, compared to that of many Tories, stood him in good stead. Gradually he became the Tories' leading spokesman on major issues ... MacNab, in the early 1850s, did his best to keep the high church, old Tory section in check."[74] Critically, MacNab demonstrated his flexibility and moderation by serving as joint premier in a coalition with Augustin-Norbert Morin, a leading reformist lawyer who had served his articles (and during the *Guerre des Patriotes*, his internment) with Denis-Benjamin Viger. In this role, MacNab stepped into the shoes of Francis Hincks, Morin's earlier partner.

This coalition (which would later form the nucleus of John A. Macdonald's Liberal–Conservative Party after MacNab's protégé assumed his position) was expanded shortly before confederation to include George Brown and Georges-Étienne Cartier (who had fought at Saint-Denis with Wolfred Nelson and was then exiled), under the nominal leadership of Étienne-Paschal Taché, the new leader of LaFontaine's Parti Bleu.[75] What was left of Tory fervour dissolved into the moderation of a joint administration. The moderate reformers' views became an enduring constitutionalist consensus; as always, it had been forged in response to unconstitutional abuses.

The moderate reformers' program centred on responsible government, namely the achievement of the legislative control over the executive achieved in the Glorious Revolution, overturning a system of taxation inconsistent with the Petition of Right. They created an independent judiciary, consistent with the principles of the Act of Settlement, and abhorred unconstitutional emergency

measures, namely the abuse of martial law contrary to the Bill of Rights and the denial of habeas corpus contrary to the Habeas Corpus Act. Their revulsion towards John Prince was due largely to his extrajudicial killings, contrary to Magna Carta.

All of these values were demonstrated not merely in words, but in deeds: Baldwin and LaFontaine's commitments to constitutional norms had been maintained throughout the greatest political crisis in Canadian history. At the time of confederation, Canada had no greater heroes, nor any more revered political figures. The constitutionalist views they espoused were not merely conventional wisdom; they were by this time so self-evidently true as to pass without comment. The particular features of the constitution that comprise Canada's rule of law were all proven essential during the lifetimes of every framer of the Constitution Act, 1867. They had seen with their own eyes how a compliant judiciary, martial law, denial of habeas corpus, taxation controlled by the executive, and tolerance of extrajudicial killing had propped up arbitrary and unconstitutional government. To chart the path of Canadian constitutional history, the road that leads to and from Charlottetown must be observed from that perspective. The final chapter will demonstrate how important it is for its preservation that we recover a historical orientation to its substantive constitutional principles.

7

Confederation and Beyond: Rule of Law from Universal Good to Chimera

The rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claim, seems to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction.

E.P. Thompson, *Whigs and Hunters*

The story of Canadian confederation is still taught to schoolchildren in Canada; the key lesson they learn is that it was not the result of a revolution. Indeed, it received considerable encouragement from imperial officials and was understood by many of its Canadian proponents as a continuation of a process that had begun with the creation of the united Province of Canada. Ten years after New Brunswick finally obtained responsible government (some eight years after the Canadas and Nova Scotia), the government of the United Kingdom began encouraging its colonies on the west side of the Atlantic to join in a maritime union. Delegates from the Province of Canada came to the Charlottetown Conference on 1 September 1864 and argued that on the basis of their experiences since 1849, a union that included Canada would be to everyone's benefit.

A month later, the delegates reassembled in Quebec City, where there was an intense discussion over the proposed division of powers between the federal parliament and those of the provincial legislatures. A general structure of political institutions was agreed upon, and the general terms of the bargain were memorialized in the Seventy-Two Resolutions. Two years later, representatives from the Province of Canada, Nova Scotia, and New Brunswick met in London, and a number of difficult issues related to religious freedom, education, and language rights were resolved.

After a provision protecting the rights of English speakers in Quebec was quietly agreed to, a draft bill was prepared. While John A. Macdonald was the animating spirit of the London Conference, many of the other delegates (most notably, George-Étienne Cartier) were reformist lawyers who had fought for responsible government; this group included notables such as Charles Fisher, later "considered the leading constitutional lawyer of the day" in New Brunswick,[1] and Nova Scotia's William Alexander Henry, a "highly skilled" lawyer who became one of the first justices of the Supreme Court of Canada.[2]

It took less than two months to broker agreement between the Canadian politicians and less than two more – after an uncontentious debate – for the bill to pass through both Houses of the Westminster Parliament and receive royal assent. Due in part to the many points of agreement along the way to confederation, there is a dearth of direct evidence about the framers' intent. As Hogg and Wright note, "[T]he historical record is weak, making it difficult to determine, definitively, the intentions if any of the framers. There are no verbatim records of the discussions at the confederation conferences ... Further, of the three uniting provinces ... the legislative assemblies of two of those provinces (Nova Scotia and New Brunswick) did not hold confederation debates. The Parliament of the United Kingdom debated the bill that was finally drafted in London, and that debate is recorded in Hansard. The result is that we have an incomplete historical record."[3]

Despite this fact, however, Hogg and Wright refute Alan Cairn's charge that "the pursuit of the real meaning of the [Constitution Act, 1867] is a meaningless game, incapable of a decisive outcome."[4] With respect to the substantive principles of the rule of law that the constitution embeds, that would be the inevitable conclusion, if we had to begin the analysis with these debates rather than ending there, having followed the road from Runnymede, through a number of constitutional crises that included a bloody prequel to confederation, right on Canadian soil. Unfortunately, prominent schools of constitutional interpretation have turned away from approaches that rely on this legal history in the twentieth century, a dynamic that can be explained in part by the ambivalent approach to legal history demonstrated by Dicey's approach to the constitution of the United Kingdom. What is most curious for constitutional historians is the fact that Dicey's blind spot, which passed largely unnoticed in the past hundred years, has a historical

connection to the fraught relationship between constitutional history and approaches to legal and political theory that emerged in relation to – and in competition with – the constitutionalist ideas that animated the common law tradition described in the last part of this volume. This too must be explored if the nature of threats to Canada's rule of law are to be adequately understood.

EARLY MODERN ROOTS OF THE FIELD OF LEGAL PHILOSOPHY: RESISTANCE TO CONSTITUTIONALISM

The history of the rule of law, as we have seen, details its emergence from a centuries-old running conflict between constitutionalists and absolutists. Both sides of the debate have always had their adherents and apologists. Absolutism, both past and present, has enjoyed the support not only of kings, some lawyers, and politicians but also of a number of prominent thinkers.

The early modern era dawned over a civilization in turmoil. The breakdown of feudal relations and the medieval political order threatened to plunge Europe into an existential crisis, as the overturning of established hierarchies threatened to throw society into chaos. The harbinger of this threat was Girolamo Savonarola (1485–98), whose demagoguery turned Florence – the jewel of the renaissance – into a city ruled by a mob, chiefly remembered for the Bonfire of the Vanities. While Savonarola was himself burned at the stake on the orders of Pope Alexander VI, the corruption and venality of the Borgia papacy spread the embers of cynicism and nihilism to the four corners of Europe.

One Florentine political theorist who barely survived the reigns of Savonarola and Alexander (and the brutal methods employed by Cesare Borgia, the Pope's son) was Niccolò Machiavelli. Exiled after the Medici restoration in 1513, Machiavelli then wrote a treatise called *The Prince*, a stunning departure from medieval ideas about political power, taken by many readers to defend amoral or even immoral acts done to preserve a ruler's position. Machiavelli's treatise provides the first modern example of the use of the greater good as a justification for what would otherwise be considered sinful or tyrannical.

The Prince was an instant success. In England, it was held in very high esteem by Thomas Cromwell and Francis Bacon, but it achieved even greater influence in France, where it came to be associated by Catherine de' Medici (the daughter of Lorenzino, to

whom it was dedicated), especially after the St Bartholomew's Day massacre, when her son Charles IX was forced to justify a pogrom that killed tens of thousands of Protestants by reference to reasons of state. Innocent Gentillet called *The Prince* "the Koran of the courtiers," as it justified the policies of the *politiques* who defended every action that would strengthen the monarchy, which they held was the only bulwark against anarchy during the French Wars of Religion.

Foremost among the *politiques* was Jean Bodin, whose *Six Books of the Commonwealth* created a new paradigm for both sovereign and executive power during emergencies. It flatly rejected the idea of a mixed constitution, in which sovereignty was divided between various branches of government.

Drawing upon partial and incomplete surveys of history, Bodin "attempted to derive the contents of supreme authority [that which a king possesses] from the concept of supremacy itself ... He was thinking of 'the sovereign' as one part of the society which rules the rest, according to the familial model of a kingship ... a mixed constitution [like England's as described by Fortescue] seemed a contradiction ... The fallacy in all of this is so transparent to the modern reader, and so profoundly foreign, that it is sometimes tempting to look for deeper lines of reasoning."[5] However, there is no deeper logic to Bodin's essential argument about the indivisibility of sovereignty, which is the sole basis for his argument that the king of France is not bound by the laws. "The entire case is thus colored by a *petitio principii* [an argument that assumes the conclusion in the form of a premise]: Sovereign authority is absolute; the king of France is sovereign; [therefore] the king of France is absolute."[6] "Bodin's only justification for this odd result is drawn from practical necessity."[7]

The Huguenots – adhering not only to Protestant theology but also to medieval constitutionalism – claimed after the St Bartholomew's Day massacre that the king had exceeded his powers to the point of becoming a tyrant who could lawfully be resisted. The only solution remaining to the French royal government was to reject their legal paradigm and claim that the king cannot be bound by the laws, so that, when faced with an alleged emergency such as the rumoured plot to murder Charles IX, he was not bound to put the conspirators on trial. Instead, he could simply condemn those subjects he accused of treason on his own authority.

This theory served to legitimate a range of notorious abuses, and set the precedent for the *lettres de cachet* that authorized the indefinite detention of innumerable political prisoners. These orders, which sent the person named directly to prison without any contact whatsoever with the judicial system, became ubiquitous: "although it is commonly believed that the employment of *lettres de cachet* was largely confined to affairs of state, yet this is far from the truth."[8]

Owing to the constitutionalists who continued to champion the ideal of the mixed constitution and the fundamental laws that monarchs were bound to respect, "the public endorsement of Bodin's views in England was the height of constitutional heresy."[9] However, along with Machiavelli, Bodin was a key influence on Francis Bacon's theory of law and government, which (as we have seen in the fourth chapter) became the most coherent rival of Edward Coke's. In his *Aphorisms on Universal Justice*, Bacon argues that private rights are subordinate to the rights of the sovereign, since "[p]rivate right depends upon the protection of public right. For the law protects the people, and magistrates the laws; but the authority of the magistrates depends upon the sovereign power of the government."[10] To justify this conclusion, Bacon rejects constitutionalism (and foreshadows the work of his ardent admirer Thomas Hobbes), writing that since laws change, "it follows necessarily that there is in any commonwealth a certain power above the laws, that can abolish them and make them anew ... the authority of laws does not depend upon consent alone, but wholly upon ruling authority [imperium]."[11]

Bacon wrote "in good hope that when Sir Edward Coke's Reports, and my rules and decisions shall come to posterity, there will be (whatsoever is now thought) question, who was the greater lawyer?"[12] Posterity has spoken: following his impeachment in 1621 and the abolition of his beloved Star Chamber in 1641, Bacon's legal work became a historical footnote. Coke, author of the Petition of Right, became a hero to generations of constitutionalists. Bacon, however, became another figure in the counter-tradition of absolutism, or – following Bodin – sovereignty, by means of his influence on Hobbes, who in turn had a formative influence on political theory. From its outset, then, this counter-tradition was defined by its opposition to constitutionalism.

During both the early and late Stuart eras, Hobbes – Bacon's star pupil – supported that dynasty as he made war on the constitution.

After serving briefly as Bacon's literary secretary,[13] Hobbes fled to France in 1644, fearing that pamphlets he had written rejecting the importance of the consent of the governed would lead to retribution from Parliament. After the future Charles II came to Paris, Hobbes served for a year as his tutor, during which time he composed *Leviathan*.

Leviathan's theory of sovereignty draws heavily on Bodin and Bacon. Like Bodin, Hobbes relies on an ahistorical thought experiment, which purportedly demonstrates that the monarch must possess absolute power in order to protect the people from themselves. It is a trivial matter to demonstrate Hobbes's poor reputation in the seventeenth and eighteenth centuries, particularly in North America: during the American Revolution, Hobbes's ideas were notable chiefly for being wholly unacceptable to both sides: "Hobbes [was] denounced as frequently by loyalists as by patriots."[14]

This is not surprising, given *Leviathan*'s rejection of the constitutionalism that became the consensus in both England and its American colonies after the Glorious Revolution and its rejection of the views of those who had become that revolution's heroes. For one thing, *Leviathan* contained strenuous criticism of Coke; following Bodin, Hobbes argued that "Law ... is the command of a sovereign which, though it may be iniquitous, cannot be unjust. Neither case law, nor custom, is truly law."[15] According to Hobbes, the sovereign's power knew no bounds: "these laws cannot bind him, since otherwise he would lose his supreme power to keep order."[16] Like all his royalist antecedents, Hobbes claimed that the subjects of the sovereign cede to it any pretense of rights, as the condition for the protection that the sovereign provides from the war of all against all. In order to protect the populace, Hobbes argued, the sovereign had a right to demand undivided and unlimited authority.[17]

It should be noted that Hobbes's thoughts on sovereignty evolved across his works, and accordingly it is possible to interpret his political theory as one which imposes some restrictions on the sovereign's power. Accordingly, it is possible to demonstrate that Hobbes's approach is not incompatible with the rule of law, at least on certain interpretations of that concept. This is ably demonstrated in the recent work of David Dyzenhaus and Evan Fox-Decent. However, what is more pertinent to this volume is the interpretation of Hobbes during the eighteenth and nineteenth century, as it was charted in detail by Quentin Skinner and the in-

tellectual historians of the Cambridge school, and others including Gerald Postema. In particular, the interpretation of Hobbes by political theorists who are hostile to the idea of natural rights, or to what we might now call a "thick" conception of the rule of law, are of particular interest here.

Despite the decisive rejection of Hobbes by the constitutionalists of the English-speaking world during the early modern era, he would pass along his views to the next generation's political theorists. In particular, he was a decisive influence on one thinker who was not appreciated in his own time, but came to exercise a decisive influence on legal scholars, particularly on the subject of the rule of law: like Hobbes and Bodin, the acolytes of his tradition would need a theory that could absolve a sovereign's crimes in the name of necessity – and this time, the terror would be an order of magnitude greater.

POLITICAL AND LEGAL THOUGHT FROM THE AGE OF REVOLUTIONS TO PROGRESSIVISM

Many moderate reformers in eighteenth-century England welcomed the abolition of feudal absolutism across the channel but blanched when the political order degenerated into the Reign of Terror. The definitive British rejection of the principles of the French was articulated by Edmund Burke, who by that time had become the leader of the Old Whigs in the House of Commons.

In speeches in the House and in his *Reflections on the Revolution in France*, Burke distinguished the French Revolution from the Glorious Revolution:

> The [Glorious] Revolution was made to preserve our ancient indisputable laws and liberties, and that ancient constitution of government which is our only security for law and liberty ... We wished at the period of the Revolution, and do now wish, to derive all we possess as an inheritance from our forefathers . ... Our oldest reformation is that of *Magna Carta*. You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties. They endeavour to prove that the ancient charter ... were nothing more than a reaffirmation ... In the famous law ... called the *Petition of Right*, the

parliament says to the king, "Your subjects have inherited this freedom."[18]

In this way Burke famously contrasted England's Glorious Revolution with the French Revolution, which according to his account had empowered the *philosophes* to deduce the best possible society from abstract principles: this, Burke was certain, would lead to horrifying results.

While the Terror soured most Britons against the French revolutionary tradition, it actually served to reinforce the opinions of its most diehard defenders. One of these was Jeremy Bentham, who was converted to radicalism by the French Revolution and became one of the few English political reformers to argue that the political institutions of the United Kingdom should be reshaped in the image of that revolutionary republic. However, while Bentham was spurred to action by events in France, his thought was influenced more by earlier English thinkers, especially Hobbes. "Historians of political thought ... infer that Bentham was in a certain sense a disciple of Hobbes"[19] or indeed "a careful student of Hobbes."[20] This is particularly evident whenever Bentham addresses law and rights; largely as a result of his these efforts, on this topic Hobbesian "ideas [gradually] became respectable."[21]

As Hobbes's approach to law is defined by his rejection of Coke, Bentham's may be characterized by his hostility to Blackstone. One of Bentham's first works was a vituperative attack on the *Commentaries on the Laws of England*, which in Bentham's view "teaches nothing."[22] Bentham's chief complaint about the constitutionalist tradition was its claim (reiterated by both Blackstone and Burke at the end of the eighteenth century) that rights were merely recognized by law rather than created by the sovereign. In Bentham's often-cited formulation, natural rights "is simple nonsense, natural and imprescriptable rights, rhetorical nonsense – nonsense upon stilts." Rather, "rights are the fruit of the law and of the law alone. There are no rights without law, no rights contrary to the law, no rights anterior to the law ... We may feign laws of nature – rights of nature, in order to show the nullity of real laws, as contrary to those imaginary rights; and it is with this view that recourse is had to this fiction: – but the effect of these nullities can only be null."[23]

Unsurprisingly, Bentham's philosophy of law was largely ignored by lawyers during his lifetime; it attained prominence only

after being popularized by Bentham's younger disciples. The leading expositor of his theory of law was John Austin; like Bentham, another failed would-be lawyer. Owing to his friendship with Bentham, Austin was appointed the first professor of jurisprudence at the University College London, at the time an unaccredited institution devoted to Bentham's ideals.

Austin's failings – at least, as a legal scholar, and not as a political theorist – are widely known. Oliver Wendell Holmes once commented that the "trouble with Austin was that he did not know enough English Law";[24] one modern commentator notes more cautiously that "if Austin did know much about English law, it is not evident from his writings."[25] This lack does not seem to have troubled Austin, who, following Bentham, insisted that only a philosophical reconstruction of the nature of law divorced from history could discern its true meaning and purpose: "the knowledge of an English Lawyer is nothing but beggarly accounts of scraps and fragments ... of the Law as a whole, and of the mutual relations of its parts, he has not a conception."[26] Unsurprisingly, Austin also had a low opinion of Blackstone and constitutionalism.[27]

"During his lifetime, he was a prophet without honour," but within a few decades, in the view of H.L.A. Hart – indisputably the leading oracle of the law in his own time – "it was clear that [Austin's] work had established the study of jurisprudence in England. And it is now clear that Austin's influence on the development in England of the subject has been greater than that of any other writer." One might be forgiven for imagining that Austin's views had changed posthumously. What might have appeared even more implausible – until it happened – was the general transformation of society in the decades that followed Austin's death, decades that witnessed the advent of modern liberalism, the modern university – and, alongside them, the Benthamite views of John Stuart Mill. The teaching of law would be roiled in the twentieth century by the confluence of these developments.

THE AGE OF REFORM: RATIONALITY, PROGRESSIVISM, AND CHANGES TO LEGAL EDUCATION

In common law nations, until the twentieth century the legal profession had complete control over the training and initiation of its members. In England, this principle dated back to 1234 when

Henry II stimulated the creation of the Inns of Court by exiling the training of lawyers from the City of London to the Borough of Holborn. Until Blackstone was appointed the first Vinerian Professor at Oxford University in 1758, the ancient universities taught only Roman and canon law, leaving the teaching of common law to the profession for more than 600 years. In the century that followed Blackstone's appointment, however, the new universities inspired by Bentham and his utilitarian disciples contained faculties devoted to the scientific study of the discipline of law. Under the new stars of the Benthamite firmament, Austin's science of law would wax, and the historical approaches associated with Blackstone would wane.

Austinian approaches to the study of law were uncompromising towards those that preceded them. As Gerald Postema notes, in "premodern societies traditional history ... was essential for the understanding and legitimation of law," but in modern nineteenth-century society, by contrast, "appeal to sovereignty and formally validated statutory law replaced history and tradition in the identification and legitimation of law."[28] Lon Fuller argues that the new approaches to jurisprudence were conceived of as a conscious attempt to replace the erroneous self-understanding of the legal profession. The reformers wanted to reconfigure law as an instrument of social change in order to achieve the social goods identified by Bentham and Mill. However, this aspiration was in tension with their claims of objectivity, on which they predicated their conclusion that they had created a scientific and rational understanding of law.[29]

The goal of producing an objective science of law was attractive because of the appeal of science during the progressive era: the fruits of the Second Industrial Revolution created by numerous scientific breakthroughs raised standards of living and health to unprecedented levels. Thus the tension between this claim of objectivity and the goal of producing better laws (where better was defined by reference to the principle of utility) remained latent owing to popular belief that the idea of progress was itself scientific: progress and the public good were now considered by many to be objective and measurable, and any change that was made in a scientific way was bound to contribute to positive social change. As "Fuller complained [with characteristic gimlet-eyed sensibility and good reason], "something happened between Hobbes and Austin that drove positivism to hide its normative origins like an unpleas-

ant family secret."[30] Few saw the *Leviathan* in Austinian legal science's family tree.

Yet the instrumental conception of law associated with this ideology was incompatible with the profession's self-understanding; this conflict remained latent in the early twentieth-century because the academic study of law had little to no influence on its practice: few lawyers and even fewer judges had any exposure to the new faculties of law, which were not yet accorded any formal or institutional role in the training of lawyers. (Put otherwise, an academic degree in law offered no advantages or shortcuts on the road to becoming a practising lawyer.) When this changed, during the Great Depression, the scene was set for these competing approaches and ideologies to be pitted against each other in an existential struggle over the nature of modern society, the state, and the law.

THE NEW DEAL, THE ADMINISTRATIVE STATE, AND CANADA'S RULE OF LAW

As is well known, the period of unparalleled growth and prosperity that prevailed from the beginning of the Gilded Age to the end of the Roaring Twenties (that is, from 1877 to 1929) produced a very hard landing. What was worse, the Great Depression proved immune to all the traditional means of alleviating a downturn. By the middle of the 1930s, it was evident that drastic action was needed. The United States, Canada, and the United Kingdom created extensive new public programs aimed at providing relief to the unemployed and stimulating the economy. One consequence of this was the controversial creation of the administrative state, which, in the opinion of its critics, entailed a vast expansion of executive powers. In all three countries, the legal profession – and especially the judiciary – expressed concern over the creation of new forms of legal authority.

In the United Kingdom, the creation of new regulatory agencies with law-making and enforcement powers supervised only by the executive was the subject of a blistering attack by the lord chief justice of England, Lord Hewart. "The publication of *The New Despotism* ... caused a constitutional and political storm ... it alleged that ... delegated legislation had produced a 'despotic power enabling government departments to place themselves above Parliament and beyond the Courts.'"[31] Not surprisingly, the bulk of

the legal professions of the English-speaking world were largely in agreement with Hewart, whose rallying cry for the defence of established forms of governance was the preservation of the rule of law.

Liberal and progressive governments dedicated to the implementation of large-scale administrative programs to alleviate the Great Depression turned to the emergent legal academy – and away from the judiciary – for help in formulating a justification for a massive expansion of executive powers. In the United Kingdom, this catapulted academics with a positivist view of the law and utilitarian approaches to its values to prominence, Ivor Jennings chief among them. In his response to the judges, Jennings decided that the best defence to their charge that the administrative state was a threat to the rule of law was a good offence. His counterattack was the prototype of many criticisms of the rule of law since: characterized by an emphasis on what analytic jurists and legal realists deem its theoretical incoherence. "[R]ule of law is apt to be an unruly horse," Jennings sneered; "the idea includes notions which are essentially imprecise."[32]

Jennings' criticism of the rule of law was the forerunner of numerous arguments that would associate "thicker" and historically oriented conceptions of the rule of law with economic and social conservatism, which found many American adherents. In the United States, President Franklin D. Roosevelt created a "brain trust" that included Felix Frankfurter, a law professor at Harvard Law School who had been a founder of one of America's first law reform organizations. Like Jennings, Frankfurter "rejected the widely held dogma ... that equated the Rule of Law with the freedom to challenge any administrators' deprivation of a private right in a proceeding conducted in 'the ordinary legal manner before the ordinary Courts of the land.'"[33] (Put simply, his view was that nothing in the law requires that a private citizen be able to challenge the government's actions in court, a position that anti-administrativists argue is in tension with the principle of legality.) Frankfurter later "supplied Roosevelt with a wealth of material in support of a court-packing plan in which Roosevelt would have appointed as many pliable Justices to the Supreme Court of the United States as he needed to keep the Court from striking down his reform agenda on constitutional grounds."[34]

During this period, the Canadian academic who led the charge against the judiciary and the rule of law was John Willis. In Eng-

land, "the young Willis associated himself with a broader scholarly movement ... that had assembled counter attacks on administrative governance from the bench."[35] He then became Felix Frankfurter's research assistant at Harvard for two years, during which time he wrote a rebuttal of *The New Despotism*. His book approved of the British Parliament's decision to assign authority "to the body which experience has shown best fitted to perform the work in question. Little or no regard was given to whether this allocation of authority transgressed constitutional boundaries between legislative, executive, and judicial powers."[36]

A line of influence from Hobbes to Bentham to Willis is evident in the latter's scholarship, which was explicitly associated with a movement that "saw the legal world as one dominated by common law, courts, formal reasoning, and individual rights, and condemned it as both unrealistic and unjust: unrealistic because its reasoning neither determined nor explained results, and unjust because it masked political and economic values at odds with the values of democratic majorities. Instead, they [the movement's proponents] argued, legal thinking must be 'functional,' seeking to serve social needs."[37] While this description was intended to be laudatory, it nevertheless exposes the central issue with the work of thinkers, who, like Bentham, see no *hubris* in the claim that they can identify what is best for society, namely the ends to which individual rights and formal reasoning must give way. In Sheldon Wolin's view, this is typical of political theory after Bentham, which is "eager to surrender to impersonal power, power which seemingly belonged to no specific individual. The entity which satisfied these longings was society."[38]

Willis's thought was in step with his times while he was young and naturally sudden and quick in quarrel. By the end of his career, the divergence between the majority's political values and those of an earlier age exposed a childish treble in his criticism. Still, his career was noteworthy, tracking the trends that created the modern legal academy as we know it in Canada today, and he expounded the view of the rule of law that prevailed within in it for decades.

In 1933, Willis left his position with Frankfurter to begin teaching at the Dalhousie Law School. This was the second faculty devoted to the scientific study of law in the Commonwealth; it followed only Austin's at Bentham's University College London. At that school's founding in 1883, Dean Richard Chapman Weldon, who himself had no formal training – that is, prior to that date,

legal training that was by definition, professional – in common law, committed it to "teaching young men the science of government."[39] This would seem to indicate that it was devoted to teaching its students how to change the laws rather than how to learn and know them. That was not the case at Osgoode Hall, where professional legal education was controlled by the benchers of the Law Society of Upper Canada (that is, the self-selected ruling body of the legal profession in the province) and where it took place in the same building where Robert Baldwin had served as treasurer. This situation was not at all to Willis's liking when he joined its faculty in 1946.

Willis joined his fellow Harvard alumnus, Dean Cecil Augustus "Caesar" Wright, another scholar who also believed that "the end of law must always be found outside of the law itself" and who held that this necessitated a revolution in legal education.[40] The benchers rejected Wright's vision of a law school; in response, in 1949 Wright and Willis led an exodus from Osgoode Hall to the University of Toronto Faculty of Law, where Wright (who assumed the deanship) and his fellows brought with them "a sense of a need for reform of law and a faith that reform was possible ... [and] a belief that legal scholars, legal scholarship, and legal education had a distinctive and necessary role in making reform."[41] Willis and his colleagues did manage to refashion legal education as an engine of reform, but they did so at the cost of creating a rift between the teaching of law and the profession, including the judiciary.

Wright, Willis, and Bora Laskin inaugurated a transformation of the nature of a Canadian law faculty. In implicit distinction to the vision of the school's founder W.P.M. Kennedy, Laskin and Wright called the new faculty a "modern" law school.[42] A *modern* law school – one with a curriculum defined by legal academics – was to be defined in opposition to the traditional model of legal education, as it had been conducted under the control of the legal profession until that date. This entailed a thoroughgoing marginalization of legal history. As Philip Girard noted:

> When Cecil Wright arrived as the new dean of the faculty of law at Toronto in 1949, he axed three compulsory courses of a historical nature that had been part of the curriculum under Dean W.P.M. Kennedy: English constitutional law, the history of English law, and the history of Canadian constitutional law.[43]

Furthermore, "Wright, when he ultimately succeeded Kennedy ... would do all he could to exclude Kennedy from the life of the law school and to erase and obscure his place in the collective memory of the institution. Kennedy was almost forgotten."[44] This *damnatio memoriae* can only be understood if one grasps that Wright and Willis were fundamentally hostile to the historical approach to law (and particularly constitutional law) that Kennedy represented; it should also be noted that Kennedy was an antinationalist who had a constitutionalist historian's deep mistrust for governmental claims of power amplified by nationalism: Kennedy's view was that "modern nationalism and the striving for absolute sovereignty was a retrogressive and dangerous force."[45] This set him squarely against the tradition of legal theory defined by Hobbes, Bentham, and Austin (and later, Dicey): Kennedy, who in his 1922 masterpiece *The Constitution of Canada* had adopted a firmly historical approach to sovereignty, argued in 1924 that "having cast down the Austinian idol, let us grind it to powder."[46]

Kennedy's *magnum opus* had been a sweeping treatise on the historical origins of the Canadian constitution, which in his view shed considerable light on its meaning. The title of the 1937 edition (subsequently changed) was *The Constitution of Canada 1534–1937: An Introduction to its Development, Law, and Custom.* As its title indicated, Kennedy's volume recognized that the English statutes of constitutional significance were embedded within the Canadian constitution. It noted that:

> The constitution of Canada is partly written and partially unwritten. The unwritten constitution includes all the great landmarks in British history in so far as they are working principles – Magna Carta, the Petition of Right, the Bill of Rights, the Habeas Corpus Acts, the Act of Settlement ... A general consideration of these Acts in their terms and workings is the best introduction to the scheme of Canadian government.[47]

Kennedy's account of the development of the Canadian constitution was published to remarkable acclaim from both the legal profession and academics. The Lord Chancellor of England Viscount Haldane labelled it a "remarkable volume," while Harold Laski noted that "to say that Dr Kennedy has written a valuable book is to do him less than justice; he has written what is likely to remain the standard introduction to the study of the Canadian constitution."[48]

Laski, however, had not accounted for the wrenching dislocation in legal education that occurred when academics – in the person of Cecil Wright and John Willis – began to wrest control from the profession.

It is remarkable how closely this passage from Kennedy parallels Chief Justice Lamer's reasons in the *Provincial Judges Reference;* while this is evident, what is not yet clear is the degree to which this was antithetical to much of what would be written on this subject within academia during the fifty-year interval that began with the end of Kennedy's deanship. During Wright's tenure, Kennedy's volume was out of print. No similar volume was published during the remainder of the century. This can only be explained by the fact that it was not only Kennedy's role as the founder of legal education at University of Toronto that Wright and Willis sought to obliterate but his historical approach to the law of Canada and in particular the importance of the development of the constitution of the United Kingdom to its interpretation – what Willis tellingly derided as the "lawyers constitution."

While firmly ensconced in what quickly became Canada's most prestigious faculty of law – perhaps in part because it was modelled closely and self-consciously on Harvard's – Willis continued his assault on the legal profession's self-conception. The strangeness of this view became apparent over the course of his career, as he increasingly showed himself unable to rely on agreement over ends to distract his readers from his uncompromising means. In the midst of the cultural revolution of the 1960s, Willis insisted that "*effective* government should, where there is an irreconcilable conflict, always outweigh the public interest in the protection of the individual."[49]

Willis's notion that individual rights can only be justified if they are in the public interest was the source of his deep-seated antipathy to the rule of law. Like Bentham, Willis thought that the rights it protected were illusory and any assertions of a contrary faith were disingenuous cant. "Of all the 'theological' concepts, Willis considered the concept of the rule of law the most abstract and pernicious ... a matrix of like-minded concepts [that] obstruct progressive change and thwart the realization of the common good ... constitutional architecture, unwritten principles and medieval maxims all conspired to bolster the lawyer's constitution, a 'Pseudo Bill of Rights' that 'reek[ed] of the natural law.'"[50]

David Dyzenhaus noted that, because of his mistrust for embedded constitutional principles, "Willis was unable to deal with the logic of the rule of law. He wanted rule by law,"[51] because, in Willis's words, the "currently fashionable cults" that fasten onto claims about constitutional rights do damage to "effective government" if they are "allowed to infiltrate too deeply."[52] These claims involved the most basic rights, of the type protected by the substantive provisions of the rule of law as identified in the second part of this volume. Willis defended indefinite arbitrary detention in both Canada and the United Kingdom. When Lord Atkin "'likened his fellow judges' attitude to detention [during the Second World War] ... to that of the officials of Charles I's Star Chamber, Willis said the issue was 'no more that a question of the interpretation of a set of internment regulations,' of which he approved."[53]

More odiously, Willis was a die-hard defender of the rejection of the claims of Japanese Canadians, predicated on the Habeas Corpus Act, 1679, that they could not be forcibly repatriated to Japan. He criticized Ivan Rand's reasons, which argued that this action was despotic, countering, per Dyzenhaus, that "this was simply another example of a judge imposing archaic values [namely, the substantive principles of the rule of law] on modern government."[54] Dyzenhaus concluded that "Willis' understanding of law was, in fact, a stripped-down version of the legal positivist model developed by the great utilitarian thinkers Jeremy Bentham and John Austin. Law is simply an instrument of the social policy of the powerful," which Willis trusted implicitly.[55]

Willis provides the clearest twentieth-century example of an instrumental conception of law, which depends on an implicit premise: their utility hinges on whether they promote societal progress. Unfortunately, by the end of his career his yardstick for progress was also noticeably shorter than those wielded by his students, as he denounced:

> The cult of the 'individual' and claims by prisoners in penitentiaries, complaining of their treatment there or applying for parole, to a 'formal right to be heard'; the cult of 'openness' and claims by the press to the right to dig into confidential government files; the cult of 'participatory democracy' and claims by 'concerned' busybodies to the right to be allowed to take court proceedings to curb, say, alleged illegal pollution or alleged dereliction of duty by the police.[56]

As this jeremiad was published in 1968, one might imagine that his students at the time took him to be an advocate of reaction rather than of progress, but it is remarkable how little some members of the next generation of legal theorists – among them, former students – would deviate from his most basic assumptions about the rule of law. The view that the rule of law was theoretically incoherent and an impediment to progress remained unchallenged, even as what was thought to constitute progress transformed.

RADICALISM IN THE LAW SCHOOLS FROM 1968 TO THE PRESENT: ALIENATION FROM THE LAW

The events of 1968, like those of 1929, stood out against a background of previously unquestioned narratives of progress, which were exposed as naive and simplistic. A wave of revolts washed over the world; the surge began as a reaction to American imperialism in Southeast Asia but swelled owing to the anger of a generation of young adults who rejected the worldview of their elders, which was predicated on nationalism and blind obedience to governmental objectives.

In the United States, young Americans' hostility to the government intensified after the election of Richard Nixon on 5 November 1968 when he defeated Hubert Humphrey. Nixon prevailed over weak opposition from the Democratic Party owing to the assassination of Robert Kennedy four months earlier. Nixon's election led to an escalation of the already unpopular war even before he was sworn into office, as the US Air Force resumed a massive bombing campaign in Laos, in violation of the Geneva Accords and the most fundamental principles of international law.[57]

While American's Camelot had been destroyed five years earlier, Nixon's election seemed to many to be the salting of the earth. Nixon was set to dismantle whatever remained of Kennedy's New Frontier agenda by discontinuing Lyndon Johnson's Great Society domestic programs. The war on poverty had been replaced with an ever-expanding war in Indochina, as the Tet Offensive of 1968 had demonstrated that American claims of winning the war against the communist insurgency had been self-serving lies.

Disillusionment was the prevailing sentiment in academia during the Nixon administration. The most liberal segments of the American public reacted to Nixon's election with disbelief – he had long been a hated figure on the American left owing to his associ-

ation with McCarthyism and other forms of dirty politics – but incredulity quickly turned to rage. This was particularly true within the universities, even more so in the law schools, for Nixon had defined himself against liberalism within the legal profession in particular: he "ran as a law and order candidate, and made a major issue of the Warren Supreme Court."[58]

What is perhaps most remarkable about the reaction to the Nixon administration within the legal academy is the way that it preserved the positivist orientation to law even as that philosophy's traditional orientation towards enabling government was reversed into an oppositional stance. Another way of describing this is that when the government was no longer acting in the public interest – as most legal scholars now understood it – the duty was to offer resistance rather than cooperation. While the world turned upside down, the instrumentalist conceptualization of law remained the same.

The reversal of values without a change in methodology could be observed without difficulty in America's law faculties. The "legal historian Calvin Woodward wrote in 1968 that ... 'functionalists' and 'realists' are no longer lonely aliens in a hostile world ... Graduates from the better law schools ... would become professors at law schools across the land, carrying with them and propagating these views."[59] The student bodies of these faculties were the bellwethers that indicated a change in ideological direction. The 1969–70 editorial board of *The Harvard Law Review* wrote that because of "the invasion of Cambodia and the official murders at Kent State, Jackson State and elsewhere ... [we] now feel the need to act directly to change current national policy."[60] A number of these editors "would go on to distinguished careers at top law schools" (including in Canada, where the currency of an advanced degree from Harvard Law School remains highly valued by hiring committees). As a result, since the 1970s "the instrumental value of law infused the legal academy."[61]

RADICAL INSTRUMENTALISM AND THE RULE OF LAW

In Canada and the United States, the optimism of many radical academics curdled into cynicism in 1968. Shortly thereafter, it became evident that the most devastating criticism of the rule of law was not being advanced by John Willis from what was now the right but from the left by the American scholar Morton Horwitz. By twenty-

one he had graduated from City College of New York, then known as the "Harvard of the proletariat," and began graduate studies at its bourgeois namesake. After receiving his doctorate at twenty-six, Horwitz then obtained his law degree from Harvard three years later in 1967 and joined that Law School's faculty in 1970 – during the interim he did not practice law but rather was a fellow at the law school.[62]

As Dyzenhaus noted when discussing Willis's enduring influence into the 1970s and beyond, "ambivalence about the rule of law continues to plague scholars of what I will call the 'legal left' as they try to make sense of the legal order."[63] In a presentation to the Critical Legal Studies Conference, Sir Stephen Sedley noted that while "the role of law as a brake on the arbitrary use of state power is a central tenet of liberal political philosophy ... the political Left has traditionally had little time for the law ... much critical legal theory, like much traditional theoretical writing on the Left, has adopted a correspondingly defensive and negative attitude."[64] Horwitz presents a hyperbolic but influential example of this attitude to the rule of law, in which the key premise of the "attack on the ideal of the rule of law is a line of argument first suggested by American realists at the beginning of the century, or rather by those who understood them [the realists] to advocate a radical rule skepticism. According to this argument, legal materials and methods of reasoning cannot live up to the requirements of the rule of law because they are radically indeterminate."[65] Horwitz's articulation of this argument demonstrated how hostile it was to historically oriented approaches to law, which it labelled as an element of a self-serving ideology.

Like Willis, Horwitz's rhetorical style was trenchant; the self-admitted "vulgar Marxist"[66] (who later turned Critical Legal Theorist) stood legal history on its head: "'[O]rthodox lawyer's legal history,' by emphasizing timelessness, continuity, technique, professionalism, doctrine, and 'logic,' Horwitz noted in a fiery review essay, has been 'part of a politically conservative ideology of legalism' – ... too much emphasis has been placed by others on constitutional law. Not only are "constitutional cases ... unrepresentative either as intellectual history or as examples of social control," Horwitz felt, but also "the excessive equation of constitutional law with 'law' ... focuses historians on the nay-saying function of law and, more specifically, on the rather special circumstances of judicial intervention into statutory control."[67]

It should therefore not come as a surprise that Horwitz was also scathing about the concept of the rule of law. In 1975, after the leading Marxist historian E.P. Thompson argued that "the rule of law is an unqualified human good,"[68] Horwitz penned a blistering response. Thompson had criticized "modern Marxists" who "overlooked [the fact] that there is a difference between arbitrary power and the rule of law ... [while there are] shams and inequities which may be concealed beneath the law ... the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claim, seem to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction."[69]

It followed, in Horwitz' view, that a "'legalist' consciousness that excludes 'results oriented' jurisprudence also inevitably discourages the pursuit of substantive justice." In other words, to be scrupulous about one's means is to lose focus on attaining beneficial ends, although he does not explain why concern for legalism would "inevitably" prohibit someone from seeking law reform or even constitutional reform. Most lawyers would see no tension between those two pursuits, but Horwitz was not a lawyer nor was he writing for lawyers in those heady times.

If unalloyed disdain for the concept of the rule of law was incompatible with Marxism, then Horwitz didn't want to be a Marxist. The same year that Horwitz rebuked Thompson, he attended the conference that launched the critical legal studies movement (CLS).[70] CLS can be characterized as yoking radical legal theory to a new horse: bowdlerized post-structuralism now replaced vulgar Marxism at the plough. Critical legal studies and other post-realist schools of legal theory founded as CLS fragmented remained influential within academic legal theory during the remainder of the twentieth century, in both the United States and Canada.

What unites these disparate approaches is a view that law is, for good or for ill, a tool of political power; a less obvious point of commonality is the rejection of constitutional history as a means of understanding and giving meaning to legal norms, including the substantive principles of the rule of law that create nonderogable rights. However, this left these theorists without stable ground from which to launch their criticisms of the inadequacies of the legal system: as Roberto Mangabeira Unger (formerly, a leading CLS theorist) wrote after leaving this paradigm behind:

> The thesis of radical indeterminacy turns out to be in large part a metaphor for something else: a planned campaign of social and cultural criticism. The trouble is it does nothing to equip us for the campaign or to illuminate its aims. It tempts the radical indeterminist into an intellectual and political desert, and abandons him there alone, disoriented, disarmed, and, at last, corrupted – by powerlessness.[71]

By 1976, Unger understood that radical indeterminacy was a threat to the rule of law, as he noted that "the rule of law is defined by interrelated notions of neutrality, uniformity, and predictability."[72] Unfortunately, during CLS's heyday, many – including Unger – were willing to sacrifice the rule of law to a radical critique of any possibility of neutral adjudication that led straight into this intellectual desert. Some had warned that the road to that arid place was paved with disdain for history: in the *Law & Society Review* Talcott Parsons noted that one of Unger's key errors en route to his rejection of the rule of law as an ideological project was an identification of law with the state and as being defined by being "part of the structure of *modern* societies,"[73] an assessment predicated on a failure to recognize that law had a long history as a means of resisting and limiting state power.

WHAT EXPLAINS THE ONGOING HOSTILITY WITHIN THE ACADEMY TO THE RULE OF LAW?

We should not expect every Canadian legal theorist to be enthusiastic about jurists' continued preference for traditional legal history as a guide to constitutional interpretation: this runs against the grain of a number of influential strains of modern legal scholarship and is in part contrary to the twentieth-century paradigm of legal education as academically rather than professionally oriented. However, should Canadian courts need to analyze the scope of the constitution's protections against unlawful killing, torture, or prolonged arbitrary detention, it is likely that Canada's jurists will need to draw on this history, just as Lord Bingham and other British judges have done when discussing the unwritten principles of the constitution of the United Kingdom.

Additionally, there has been considerable acknowledgement by critical legal theorists that their jettisoning the rule of law in the late twentieth century might have been premature. Unger was an

early example of this sort of reconsideration, but many more of those who had sought a revolutionary transformation of the legal system had second thoughts as well. For many, the reckoning came after the beginning of the "war on terror" and the rollback of fundamental rights worldwide; at that moment, many reconsidered the wisdom of reaching for the next rung of the ladder without maintaining a firm grip on the last.

At the beginning of the lawless administration of George W. Bush,[74] an open letter decrying the Supreme Court's nakedly partisan decision in *Bush v. Gore* was signed by hundreds of American law professors. This was laudable, but it was rendered perplexing and incongruous by the fact that Morton Horwitz and scores of his former students were among the signatories of a document that argued that "suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges ... as teachers whose lives have been dedicated to the rule of law, we protest."[75]

Viewed solely through his own theoretical lens, Horwitz's endorsement of that statement is stupefying. His career could more readily be described as one dedicated to the proposition that judges are nothing but propagandists for a dangerous illusion they call the rule of law. Nevertheless, during the Bush administration it appeared as if many critical legal scholars deeply regretted their criticism of the rule of law or as if, at the very least, they may have understood to at least some extent the consequences of governmental officials' taking that criticism seriously.

Additionally, there has also been a resurgence of interest in the rule of law among positivists and post-positivists working in the tradition of analytic philosophy. This is true even of those jurists who are opposed to the idea of fulsome judicial review for constitutionality, such as Jeremy Waldron and Bruce Ackerman. Waldron in particular has proved open to reassessing what the rule of law entails, writing in 2002 that "the Rule of Law probably cannot exist in a society unless people engage in constant argument about what the Rule of Law amounts to."[76] With increasing numbers of legal philosophers – such as Allan – arguing that the concept has a substantive dimension, one can only hope that legal historians will be welcomed into this conversation, specifically, at the moment when the argument is broached about whether it is possible to make principled arguments about the scope of the rights created by the substantive principles of the rule of law.

The increasing likelihood of a collegial conversation between jurists, theorists, and historians on the subject of the rule of law is the silver lining found in a very dark cloud that hovers over the site of its devastation. The destruction of the rule of law in the United States had helped to bring about a state of affairs in which the executive routinely violated all of the unwritten constitutional principles that America had embedded into its constitution in 1788. The president assumed an unreviewable power to kill citizens without due process, to imprison American terrorism suspects indefinitely without habeas corpus, and to subject them to torture, all without any legal accountability. It appears that Horwitz and his fellow signatories might be closing the barn door after the unruly horse is already gone, perhaps forever. Judges now claim to have no power to prevent the executive from killing an American citizen on its own authority. It should be noted that the president who argued he could do so – as opportunistic an assertion as those in Charles IX's *lit de justice* legalizing the St Bartholomew's Day Massacre – had earlier taught constitutional law at the University of Chicago Law School. He had learned that law at Harvard, where Horwitz taught.

UNDERSTANDING THE CONTINUITY OF CONSTITUTIONALISM AND INSTRUMENTALISM

As dire as the prospects for the reconstruction of the rule of law in the United States appear at present, there is cause for significantly more optimism about the preservation of nonderogable rights in Canada. It is, after all, a simple matter to reconstruct what framers of the Constitution Act, 1867 thought were the unwritten constitutional principles they were embedding into the Dominion's constitution when they drafted the preamble's guarantee. Evidence about the prevailing understanding of the meaning of a "Constitution similar in principle to that of the United Kingdom" remains relevant for courts seeking to determine the proper scope of those principles, and this is entirely consistent with the living tree doctrine of constitutional interpretation.

As those questions are both pressing and tractable, the question that remains is why so few in the Canadian legal academy have undertaken to answer them. The answer presented in this chapter is that the creation of academically oriented faculties of law entailed, at least to some degree, a rejection of self-understanding

of the legal profession in general and of its constitutionalist narrative of legal history in particular. The modern legal academy's claim to authority and dominance over the profession rested in part on its purported ability to understand law from the outside: for many scholars, this has entailed drawing upon Diceyan or post-Diceyan approaches that embody a tension with constitutionalism derived in part from the approaches to sovereignty found within the utilitarian political theory of Thomas Hobbes and Jeremy Bentham. There is a direct line of influence through the political theory of Machiavelli, Bacon, Hobbes, and Bentham to the jurisprudence of John Austin, Felix Frankfurter, and John Willis. It is for this reason that the preeminent scholar of parliamentary sovereignty (the Australian legal theorist Jeffrey Goldsworthy) could argue that "until relatively recently, legal philosophy in Britain was dominated by the Hobbesian theory that at the foundation of every legal system there is a 'sovereign,' who is the creator of all law and whose power is therefore above the law."[77] Many of the adherents of that tenet, like Willis, sought to sweep all the antiquated vestiges of the past away, including noninstrumentalist views of law and natural rights.

This was the case despite the continued popular appeal of noninstrumental theories of law and rights. In Canada, the courts remain broadly constitutionalist in orientation. It remains to be seen, however, whether the legal profession and the judiciary are capable of sustaining the constitutionalist project during the twenty-first century. What has been made clear is that the rule of law's survival depends upon the recovery of a sense of its purpose, which can only be preserved if we remember the history: this history explains why our constitutional order cannot survive without the substantive protections that were embedded after attempts to subvert it. One of the key lessons of constitutionalist history is that constitutional crises in which governments seek unaccountable power to violate nonderogable rights flare up periodically; in a heated political environment they spread like wildfires, accelerated by fears that drive the awareness of the inevitable tragedy that results from the minds of all but those who learned that history well. The fire next time might be a bonfire of the liberties.

EPILOGUE

The Meaning of Constitutional History for Judges, Lawyers, and Students

[C]oncerns about the maintenance of the rule of law are not abstract or theoretical.

Chief Justice McLachlin, *Trial Lawyers Assoc. of B.C. v. B.C.* (2014)[1]

In an age when many governments insist that an existential threat from terrorism requires that even their citizens' most important rights must give way to public safety, the rule of law forms the last ditch between a nation with binding constraints on its government and one in which a citizens' rights exist at the government's pleasure. Since confederation and before, the Canadian judiciary has asserted and reasserted its view of the importance of the unwritten constitutional principles of the rule of law and has relied on them when necessary as binding authority. Unfortunately, this reliance, as we have seen, has exposed the Supreme Court to criticism from certain sections of the legal academy; a number of influential theorists have been particularly aggressive in accusing the court of inventing these principles and of embracing a judicial activism that these critics call arbitrary and allege to be unconnected to the constitution's text.

This volume has demonstrated that much of the Supreme Court's jurisprudence on these constitutional principles – particularly the reasons of the Lamer Court – should not be dismissed for being historically oriented – which they are, and appropriately so – because they are well reasoned and, furthermore, embody a coherent approach to the rule of law that has been elaborated more fully here. That said, the court remains vulnerable to criticism as long as the roots of the living tree are only exposed when the winds of change call our attention to their role in supporting the constitutional order. It is not enough for the judiciary to appeal to history when the constitution needs defending, particularly since many academics are, as we have seen, hostile to such attempts to ground the principles of our legal order in English constitutional history.

Only if the judiciary draws consistently and with confidence upon a comprehensive historical orientation to the meaning and importance of the substantive principles of the rule of law will they be able to continue to preserve and reinforce the nonderogable rights they embed into our constitution.

The seminal opinions of the Supreme Court of Canada that outline the unwritten constitutional principles of the rule of law all have a historical dimension, and all tie these principles to the statutes of constitutional significance. This is particularly true of the *Provincial Judges Reference* (addressing the principle of judicial independence recognized by the Act of Settlement, 1701) and *New Brunswick Broadcasting v. Nova Scotia* (discussing the principle of parliamentary privilege memorialized by the Bill of Rights, 1689). However, there is little to no Canadian case law touching on the unwritten principles protected by a number of other statutes, simply because Canada has never had a constitutional crisis profound enough to call the rights these statutes protect into serious question. The relevant principles – which recognize the nonderogable rights not to be killed, not to be tortured, not to be subjected to emergency powers not authorized by the constitution, not to be subjected to punishments that exceed what are expressly specified by statute law, and not to be deprived of the right to petition a court to determine whether one has been subjected to unlawful detention, even during an emergency – are found in the Magna Carta, 1297 as interpreted and magnified by the Six Statutes; the Act Abolishing the Star Chamber, 1640; the Petition of Right, 1628; the Bill of Rights, 1689; and the Habeas Corpus Act, 1679.

As this volume has demonstrated, these statutes embedded principles and rights into the English constitution, and owing to the consensus among the Fathers of Confederation that was created by the comprehensive victory of the constitutionalist moderate reformers in 1849, they were embedded into the Constitution of Canada in 1867. Accordingly, they protect citizens against violations of rights that are now considered nonderogable under international law. The absence of any substantial discussion of these principles and rights within the jurisprudence of the Supreme Court of Canada since confederation is a testament to the stability of our constitutional order; yet, paradoxically, this presents a problem for judges and lawyers in the age of transnational terrorism.

There have been numerous proposals to allow *ad hoc* violations of nonderogable rights if they are outweighed (in the opinion of

those making the proposals) by the interests of national security. Most notably, CSIS is authorized under the Canadian Security Intelligence Service Act (as amended by the Antiterrorism Act, 2015 – formerly known as Bill C-51) to seek detention warrants that would derogate from the Charter right to counsel and to petition for habeas corpus, that is, to subject someone to involuntary disappearance. CSIS retains this authorization even though the worst features of the Antiterrorism Act, 2015 were supposedly remediated by Bill C-59 in 2018. The structure of this legislation is such that Parliament need only amend it in such a way as to remove its explicit prohibition of torture in order for its provisions to be used to authorize warrants for torture, just as Alan Dershowitz proposed shortly after the 9/11 attacks.[2] This type of legislation will remain a very real threat in the case of any a future terrorist attack, because in the Antiterrorism Act, 2015 Charter rights are explicitly subject to limitation and derogation.[3] In the age of transnational terrorism, the rights created by the substantive principles embedded by the preamble of the Constitution Act, 1867 remain as important as they were during the constitutional crises that led to their memorialization – if not more so.

THE CANADIAN CONSTITUTION: INSIGHT FROM THE JUDICIARY OF THE UNITED KINGDOM

Canadian courts have yet to enumerate the complete set of the statutes of constitutional significance that contain the most important unwritten constitutional principles embedded into our legal order by the preamble's guarantee of a "Constitution similar in principle to that of the United Kingdom." This is largely because they would not have needed to specify what was common knowledge in earlier eras, but this historical knowledge is slipping away, partly due to the passage of time but also due to the manner in which the scholars who traditionally served as the memory of the legal profession have abandoned that role and now discount the relevance of this history. Fortunately, however, Canadian judges can turn to their brethren in the United Kingdom, who have in recent years been required to address the scope and import of these unwritten constitutional principles for their own nation.

Accordingly, while it cannot be said that these British jurists have demonstrated a keener sense of their nation's constitutional history than those Canadian judges who have been required to

draw upon it – such as Chief Justice Lamer, who did so most ably – they have been required to attend to this history more frequently, and in doing so they have sought to illuminate it for a new generation. Foremost among its exegetes, as chapter 1 makes clear, was Tom Bingham (Lord Bingham of Cornhill), the last senior lord of appeal in ordinary.

As lord chief justice of England and Wales, Bingham opined about the sources of the unwritten constitutional principles, and as a scholar he discussed these principles in the most succinct and insightful treatise written on the subject to date: *The Rule of Law*. From the bench, Bingham and Lord Laws identified the constitutional statutes by reference to the Books of Authority. These treatises were integral to the identification and perpetuation of all the elements of the unwritten constitution of the United Kingdom. The last and most important of these was William Blackstone's *Commentaries on the Laws of England*, which includes within its list of statutes all of those that were embedded by the preamble's guarantee. That said, the identification of these statutes is only the first challenge; judges must also identify the scope of the relevant principle and apply it in a context that is often radically different from the time of the statute's enactment. Bingham's opinions (and those of other justices, including Baroness Hale, who is now president of the Supreme Court of the United Kingdom) demonstrate how this can be accomplished.

Bingham's reasons in *Jackson* and *Robinson* are exemplary, demonstrating that without the unwritten constitutional principles, there is always a threat that the constitutional text can be subverted in such a way that its purpose – the preservation of rights – is frustrated. These reasons show that detailed knowledge of the historical context of the statute containing the unwritten constitutional principle is indispensable, as this context illuminates the purpose that it was commonly understood to serve at the time. This approach is entirely consistent with the approach adopted to date by the Canadian courts: the statutes themselves were not incorporated into the constitution at confederation, but the principles that create the rights that were part of the unwritten constitution of the United Kingdom at that time are recognized as binding sources of law in Canada, as the Supreme Court explained in *Provincial Judges Reference* and *New Brunswick Broadcasting*.

In *The Rule of Law*, Bingham provided some of the historical context that late twentieth-century readers needed to understand

the historical context that illuminates those principles and their continued importance today. This history will be just as important for Canadians in the twenty-first century. Unfortunately, by now very few Canadian law students are given even the most cursory grounding in this constitutional history during the course of their studies. Bingham's reasons show that at times he assumed that his readers would have some basic understanding of the process of constitutional development that produced the statutes that embed the principles of the rule of law. While this may have been a safe assumption to make of an earlier generation of British lawyers, a volume that aims to be useful to Canadian lawyers and students now needs to provide a richer depiction of this historical context, hopefully in a manner that demonstrates that it is comprehensible, meaningful, and occasionally enjoyable.

REVIEWING THE HISTORICAL AND LEGAL CONTEXT OF CONSTITUTIONAL STATUTES

The living heart of this volume is its description of the crises of English constitutional history from which the rule of law emerged. Chapters 3 through 5 illuminate three different periods of constitutional development. Each new political epoch involved a crisis, in which the old means of governing was no longer possible; in each epoch, the ideals of constitutionalism would not have survived if particular techniques of subverting the ultimate limits of arbitrary power, specific to the immediate historical context, had not been recognized and specifically prohibited. The choice at each juncture was whether to allow the executive to rule without restraints on its authority or whether new restrictions would be embedded within the legal order to prevent the nation's citizens from being subjected to arbitrary rule. In this way England's unwritten constitution grew.

The principle of constitutionalism was the precondition for the development of our rule of law. In essence, constitutionalism is the idea that law is something distinct from the ruler's whims: this principle needs to exist before any restrictions on authority can be entertained. This condition was met in England: the normative framework known as "medieval constitutionalism" already existed by the time of the Norman Conquest, having emerged from struggles between the papacy and temporal rulers and a substrate of inchoate cultural norms related to elective kingship during the

early middle ages. Accordingly, by the time Henry II stimulated the development of what would be known as the common law (and its institutions), it was predictable that this would eventually include restrictions on royal authority.

The first important phase of conflict over the principle that the law was above the king occurred during the thirteenth century. King John's inability to govern and fund his foreign wars by force of his *ira et malevolentia* led to a rebellion that was resolved in a manner unprecedented in English history. Rather than deposing John, the barons imposed restrictions on his royal authority at Runnymede. After numerous reaffirmations (most of which were presided over by his son, Henry III) the principles of Magna Carta became the first clear legal limitations on English monarchs, attaining this status of law by being passed by both Houses of the nascent Parliament and given royal assent by Edward I, a process that made it clear that it was not merely a personal promise but a set of constitutional restrictions that set the boundaries for every monarch who followed him.

The section of Magna Carta that remains part of the statute law of England to this day is somewhat elliptical in its formulation: "nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." The key definitional problem in the late middle ages was the meaning of "law of the land"; while this clearly excluded outright assassinations, what about procedural evasions like Edward III declaring his enemies outlaws and entering that judgment on the court rolls with his own seal? The Six Statutes made it clear that, at minimum, any legal condemnation must follow the procedural requirements as they were defined by the medieval *ordo iudicarius*, or what in modern times is known as the requirements of natural justice, and that this requirement applied to every defendant, no matter how mean.

The early modern era came to England with the succession of the Tudors. While this era witnessed significant changes in public administration, and an even more momentous religious conflict, by its end Elizabeth I had achieved a durable theological and constitutional settlement. The next constitutional crisis came during the early Stuart era, as James I sought to evade restrictions on his use of the prerogative, which he argued was part of the law of the land despite not being part of the constitution. James clashed with the judiciary and openly stated that he was a law unto himself: his

prerogative was not a subject that the judges should discuss, and it was sufficient to warrant the imprisonment of his subjects without charges.

This was a prelude to the conflict that would erupt during Charles I's reign, with his use of the prerogative to raise taxes without Parliament's approval (a financial measure that he enforced by threats of prosecution in the Star Chamber). His claims of an extraordinary prerogative prompted Coke and his allies in Parliament to draft the Petition of Right, which established the principle of constitutionalism: the principle that the prerogative did not constitute an independent source of legal authority for emergency powers that overrides the statutes of the realm or the ancient liberties of the subject. Charles gave his grudging assent, but he sought to prevent further challenges by dismissing Parliament for ten years, a period of personal rule that was widely denounced as despotic.

When Charles was forced to summon Parliament in 1640, it pushed through a constitutionalist agenda that included the abolition of the Star Chamber and other prerogative courts connected to the executive. Since the only quasi-legal authority for authorizing torture had been connected to warrants from the council board for detention in the Tower of London, which were disallowed by the Act Abolishing the Star Chamber, 1640, this statute of constitutional significance embedded the principle that the executive could not authorize torture under any circumstances.

The late Stuart era revived all of the earlier conflicts between the Crown and Parliament, and Charles II's ability to evade the provisions for habeas corpus contained in the Act Abolishing the Star Chamber – also known as the Habeas Corpus Act, 1640 – was eliminated by the Habeas Corpus Act, 1679, which embeds the constitutional principle that the right to petition for habeas corpus may never be curtailed, even during public emergencies: courts now explicitly have the power to consider petitions for the writ whether or not they are in session, and the writ runs to any place of confinement, whether or not it is otherwise considered *hors de jurisdiction*.

The accession of James II soon led to a third serious constitutional crisis after the king asserted that his prerogative included a dispensing power that allowed him to exempt particular officials from the requirements of validly enacted laws. England's justices were by now firmly under royal control and sought to impose royal ill will on James's subjects even when the statute would

not allow for it. This led to horrific spectacles like the attempted judicial murder of Titus Oates by means of a circuit of sanguinary public whippings. Parliament responded to these abuses by deposing James II and inviting William and Mary to take the throne on condition that they accept a new constitutional settlement. This was memorialized in the final two instruments that embodied the historical constitution of the United Kingdom as it existed at confederation.

The Bill of Rights, 1689 contains two provisions that continued to have constitutional significance in 1867. The first is the recognition of parliamentary privilege. Parliament sought to prevent criminal prosecutions on the basis of what was said in the course of debate, such as the one that destroyed Sir John Eliot. The second is the prohibition of excessive bail, fines, and cruel and unusual punishment. From the context provided by the history of the Restoration era, it is possible to identify the right this legislation was designed to protect. Courts are prevented by it from imposing punishments that are beyond the scope of what has been explicitly authorized by Parliament or for a purpose that is unconnected to the meaning of the criminal statute. In essence, it protects against the imposition of punishments (including imprisonment before trial) for illicit purposes, including the satisfaction of the demands of the executive.

The Act of Settlement, 1701, remedied the failure of the Bill of Rights to address judicial independence. It provides that justices should be appointed to serve until their voluntary retirement, subject only to impeachment by Parliament and not to removal by the executive. The principle that these provisions embed into the constitution is that citizens are entitled to justice from tribunals that are independent from the executive whether they are involved in criminal or civil actions; this principle was given a purposeful interpretation when its modern scope was addressed in the *Provincial Judges Reference*.

THE TRANSMISSION OF THE CONSTITUTIONALIST TRADITION TO CANADA BEFORE CONFEDERATION

The history of these constitutional crises of the late medieval and the early and late Stuart eras was told from a particular standpoint in this volume: that of the constitutionalists. It would be possible to tell the same history in a very different manner, one that depicted

all of these as lamentable setbacks that interfered with effective government and created a set of nonsensical and incoherent rights. This would be a simple endeavour, as one could rely on a tradition established by political theorists like Machiavelli, royalists like Hobbes, and utilitarians like Bentham, who held that all of these charges were true. This volume's constitutionalist orientation to this history is best justified by the fact that it provides the perspective shared by the framers of the preamble to the Constitution Act, 1867; this view of the rights the preamble guaranteed is also consistent with a consensus shared by the legal profession at the time of confederation.

The history that demonstrates that the framers were participants in the constitutionalist tradition, as reviewed in chapter 6, begins with the story of the transmission of this political orientation from the United Kingdom to its colonies in North America during the seventeenth and eighteenth centuries. It is a simple historical fact that the religious dissidents who formed the core of the settler population during that time had constitutionalist views about their ancient rights and liberties and had fled England owing to the persecutions of the early and late Stuarts. To understand our nation's legal history and the approach to nonderogable rights at its core, we must understand that this took place in a context defined by constitutional crises that helped to form the concept of the rule of law that these dissidents carried to the colonies.

The Glorious Revolution was widely celebrated in the colonies, as it allowed them to preserve their ancient rights. During the next century of isolation from the mother country, these colonists' appreciation for the constitutionalist tradition became the closest thing they had to a national identity: Coke became their avatar of liberty. During the revolutionary period, constitutionalism was again turned against the imperial authorities, whose fatal blunder was to suggest in the Declaratory Act, 1766, that the rights created by Magna Carta, the Habeas Corpus Act, and the other statutes of constitutional significance could be modified, suspended, or abolished in the colonies.

The principles embedded by those acts were so universally prized in the colonies that both the revolutionaries and the loyalists claimed to be their truest defenders. When the exodus of the loyalists established the colony of Upper Canada, John Simcoe claimed the loyalists were a faithful remnant who had fled an unclean land. During the crises that followed the creation of the new

colonies, the imperial administrators and their allies in the oligarchies of Upper and Lower Canada adopted an absolutist view of the constitution and justified their privilege through their loyalty to the crown, even as constitutionalism was flourishing within the legal profession and the moderate wing of the Reform movement was gaining strength.

During the rebellions of 1837–38, the governors of the Canadas repudiated the unwritten constitutional principles of the constitution of the United Kingdom, imposing indefinite arbitrary detention, suspending habeas corpus without legal authority, dismissing judges without cause, instituting martial law while the regular courts remained in operation, and executing rebels convicted by military tribunals. The rebellions and the repression that followed discredited the rebels and the executives in turn; the moderate reformers had the appearance of the only principled faction in politics.

The war of ideas over the meaning of the Constitution of the United Kingdom was won by the constitutionalists when the La-Fontaine–Baldwin government routed the *soi-disant* loyalists in the debate over the Rebellion Losses Bill, 1849 and the civil disorder that followed. The erstwhile loyalists were themselves branded disloyal for having betrayed the constitution in the rebellions, and they proved that disloyalty by attempting to provoke a coup; after that failed, they attempted to assassinate the governor general and to convince the United States to annex Canada. After they were purged from public office, the judiciary, the benches of the law societies, and the upper ranks of the legal profession were populated with constitutionalists, many of whom had close connections to the moderate reform movement in general and to the Baldwins, La-Fontaine, and William Hume Blake in particular.

These reformers staked their claims about the meaning of the constitution of the United Kingdom and its protections on their unwavering allegiance to the principles of seventeenth-century constitutionalism. They observed the rights these principles recognized scrupulously, to the point of eschewing emergency measures during the Montreal riots and the widespread civil disorder that followed. Their rout of the self-styled loyalists and the refutation of their ideology was complete: the moderate reformers' vision of a constitution that included nonderogable rights recognized by the substantive principles of the rule of law became the unquestioned

first premise of the legal order of the Canadas during the era of responsible government.

WILL CONSTITUTIONAL HISTORY BEFORE 1867 BE LOST TO TIME OUT OF MIND?

Herbert Butterfield criticized the Whig historians of the eighteenth and nineteenth centuries for two errors. First, they believed that the events of history were bound to have unfolded as they did. Second, they believed that the current state of the constitution was the acme of perfection, which could never be improved. The claim that constitutional history can serve as a useful guide to the interpretation of the unwritten constitutional principles commits neither of these sins. Great Canadians like Louis-Hippolyte LaFontaine and Thomas D'Arcy McGee participated in the constitutionalist tradition despite representing communities that had never shared fully in its benefits, in the hope that by doing so they could broaden the scope of its protections. At present, and before the next major public order emergency, it is still possible for us to do likewise.

It was the author's sincere hope that the narrative of English and Canadian colonial constitutional history from the time out of mind before Henry II's death until confederation, as presented in this volume, might prove engaging, so as to draw readers into this enterprise. Drawing as it does on some excellent recent historical scholarship on topics that span Magna Carta[4] to the LaFontaine–Baldwin government,[5] it is also hopefully a passable – if all too brief – overview of eight centuries of our constitutional history. If it was presented too colourfully for some readers' tastes, this was owing to the goal of this volume: to demonstrate that this history *is meaningful* and that understanding it can give us an irreplaceable sense of purpose that explains why these principles should matter to us. Accordingly, the author's chief aim has been to convince the reader that the principles and rights that have always been central to constitutionalism deserve to be taken seriously because of their connection to the origin and emergence of our constitutional order, which was formed in order to protect nonderogable rights.

The Canadian judiciary has long operated on the assumption that this history is useful. This use of history should be uncontroversial: while the doctrine of the living tree mandates that judges not be bound to the text, it leaves ample space for a consideration of how the Canadian consensus at confederation about the

constitution of the United Kingdom should guide our present-day interpretation of the constitutionalist framework that it still rests upon. The decisions of the Supreme Court of Canada (and, recently, the Supreme Court of the United Kingdom) addressing the scope of the unwritten constitutional principles embedded by the preamble have employed historical contextualization of the statutes of constitutional significance effectively: we may learn from these exemplary decisions that, by considering the history of a given principle, it is possible to obtain the depth of field necessary for an appreciation of all that principle's dimensions.

Unfortunately, some academic responses to judicial recourse to historical context have been scathing, even when it was performed as ably as it was by Chief Justice Lamer in the *Provincial Judges Reference*. It is unfortunate that some scholars are willing to criticize the justices of the Supreme Court for having what they consider a shallow understanding of history without providing any salutary corrections. The question of why Canada's legal academics have not attempted to provide a better orientation to this historical context appears perplexing, at least until the tools of intellectual history are applied to the disciplines of law and jurisprudence themselves.

The history of academic legal scholarship – a discipline that appropriated unto itself the authority to tell the legal profession what law really means – was until recently the history of a worldview that defined itself in opposition to the constitutionalist tradition that created the rule of law. Hobbes, Bentham, Austin, and their twentieth-century descendants – chiefly Frankfurter, Willis, and Horwitz – all manifested a remarkable animus to lawyers' and judges' traditional understanding of the purpose and meaning of the rule of law and their sense of their role in upholding it. Thankfully, this is no longer true, as demonstrated by a number of developments at the conclusion of the twentieth century and beyond.

Writing three years after Bingham's volume was published, John Allison noted that "After a century in which history lost prominence in the general understanding of English constitutional law, various English public lawyers have invoked or turned to history in their treatment of doctrine, theory, and practice."[6] Additionally, as Jeffrey Goldsworthy noted, English legal philosophy no longer has a Hobbesian orientation to sovereignty.[7] Even some of the most vigorous opponents of a substantive theory of the rule of law – Goldsworthy included – have incorporated substantial and increasingly sophisticated historical analysis into their arguments.[8] Jer-

emy Waldron, another positivist legal philosopher, has welcomed and responded to arguments about the substance of the rule of law.

It appears increasingly likely that historically oriented arguments about the substantive principles of the rule of law will be taken seriously in both judicial and academic contexts in Canada, at least if trends that are already apparent in the United Kingdom cross the North Atlantic. There are some positive omens: Kennedy's scholarship was rehabilitated by the legal historian Dick Risk in an influential essay published in 1998 (reprinted in an anthology published by the Osgoode Society for Legal History in 2006)[9] and his historical exegesis of the Canadian constitution was subsequently republished by Oxford University Press in 2014.

Accordingly, the prospects for a historical reconstruction of the Canadian constitution, of the type advocated by Allison in the United Kingdom, have never been better since Kennedy's heyday. The first step towards that goal is increasing the general level of understanding of English constitutional history and its importance to the interpretation of the Canadian constitution within the legal profession. As Allison noted, the United Kingdom recently witnessed a "widespread failure, whether of lawyers or law academics, politicians or civil servants, to appreciate the diminution in historical understanding of the constitution"; this volume has called attention to a similar diminution in Canada as a preparation for that first step, which hopefully has also been taken in part by this volume in its accounts of the constitutional developments of the medieval and early modern eras and the importance of the rights that they recognized during the struggle for responsible government in Canada.

Sharp-eyed readers will undoubtedly have noted that in this book's discussions of how these principles came into the Canadian constitution via the "grand entrance hall" of its preamble, there was no discussion of whether or how the embedding of the substantive rights they recognized is limited by the doctrine of parliamentary sovereignty. This is because within Canadian jurisprudence, the unwritten constitutional principles of the rule of law and parliamentary sovereignty are considered and treated as distinct. Accordingly, the question of whether one or the other of these "twin pillars" is more important to the foundation of the constitutional architecture must await a forthcoming companion volume from this author on the topic, in which the arguments between Goldsworthy and Allan (and the importance of the historical

reconstruction of the premises of that debate, ably demonstrated by Allison) will be considered and the conclusions applied to the Canadian context.

Additionally, that volume will address whether the notion of absolute rights derived from medieval and early modern constitutional instruments is anachronistic. As the concept of entrenched rights was developed in the late eighteenth century, and the parliamentary supremacy of the nineteenth and twentieth centuries was antithetical to this development, one might argue that these rights were always subject to parliamentary abrogation. The follow-up volume will need to discuss whether the concept of fundamental law – the Rosetta stone of seventeenth-century constitutional thought – allowed Parliament to expressly or implicitly repeal rights that were described as absolute during this period. This will require detailed attention to Coke's position on this issue and to the influence (and controversy) associated with his report of *Doctor Bonham's Case*.

It will be plainly evident to readers that this volume has taken a normative stance. In asserting that constitutional history is relevant to the interpretation of the Canadian constitution, it has abandoned the pure description that some consider the hallmark of objectivity. This raises the possibility that critics might find this volume's argument to be unscientific and insufficiently rigorous owing to its normative assumptions. Yet both of these charges would be unfounded. While it is true that the aim of the philosophers of absolutism and the scholars of jurisprudence that followed them was to create a science of law (and a science of history) that would sweep away all of the errors of the common law, by now it is old hat to point out that their claim to scientific objectivity was itself predicated on a set of normative assumptions.

Hobbes argued that constitutionalism was incoherent because it would impair sovereign power. Bentham argued that the common law was inadequate because it had not been designed to maximize happiness. In the twentieth century, the realists and those who followed in their footsteps frequently characterized the rule of law as an obstacle to the creation of social programs that would instantiate their vision of a good society. All of these conclusions require value judgments, as does the decision to place a value on individual rights or the belief that certain rights – like the right not to be killed without due process – should not be balanced against or overruled by reasons of state.

By the twenty-first century, E.P. Thompson's prophetic warning about denying or belittling the good inherent in the rule of law came to pass. At that stage, Horwitz's only reply to the expressed amazement of those who had read his disdainful descriptions of what he called "traditional legal orthodoxy," was that he had "devoted his career to the preservation of the rule of law." The urgent need to rehabilitate the rule of law demonstrated by the constitutional crises of the Bush administration and those which follow should give every member of the legal profession pause for thought. As these crises demonstrate the importance of the claim that rights remain meaningful and worth protecting, it is worth considering how history can provide some useful lessons about why they are important and how best they can be preserved, so that our oaths to do so might be kept.

Notes

PREFACE

1 Philip Girard, "Who's Afraid of Canadian Legal History," *University of Toronto Law Journal* 57, no. 2 (2007): 746.

INTRODUCTION

1 Canadian Charter of Rights and Freedoms, Preamble, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11.

2 Canadian Bill of Rights, SC 1960, c 44, Preamble.

3 *Roncarelli v. Duplessis*, [1959] SCR 121 at 142, R and J.

4 "Public Statement – The Law Society of Upper Canada expresses grave concern about the arrest and detention of lawyer Felix Agbor Balla in Cameroon," *Cison Newswire*, last updated 24 February 2017, http://www.newswire.ca/news-releases/public-statement—-the-law-society-of-upper-canada-expresses-grave-concern-about-the-arrest-and-detention-of-lawyer-felix-agbor-balla-in-cameroon-614746614.html.

5 Reference Re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, [2014] 1 SCR 433 at para 89.

6 See Ian Peach, "Reference re Supreme Court Act, ss 5 and 6 – Expanding the Constitution of Canada," *Constitutional Forum* 23, no. 3 (2014): 1–6.

7 See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillian Publishers Ltd, 1889).

8 "I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*." *Reference Re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 at para 83, Lamer CJ [*Provincial Judges Reference*].

9 Martin Loughlin, "The Historical Method in Public Law," in *The Oxford Handbook of Legal History* (New York: Oxford University Press, 2018), 983–4.

10 J.W.F. Allison, "History in the Law of the Constitution," *Journal of Legal History* 28, 3 (December 2007): 263–4.

11 See Thomas Bingham, *The Rule of Law* (London: Allen Lane, 2010).

12 *Reference Re Manitoba Language Rights* [1985] 1 SCR 721.

13 *Reference Re Secession of Quebec* [1998] 2 SCR 217.

14 *British Columbia v. Imperial Tobacco Canada Ltd*, 2005 SCC 49.

15 *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9.

16 *Provincial Judges' Reference*, Lamer J.

17 *R. (Factortame Ltd) v. Secretary of State for Transport (No 2)*, [1991] 1 AC 603.

18 *Thoburn v. Sunderland City Council*, [2002] 2 WLR 247.

19 *R (Jackson) v. Attorney-General*, [2005] UKHL 56.

20 That said, this chapter will discuss the earlier *Assize of Clarendon* (1166) briefly.

CHAPTER ONE

1 With the exception of certain elements that remained subject to the unanimous agreement of the Commonwealth, such as the terms of the succession to the Crown.

2 *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*].

3 *Patriation Reference* at 876.

4 *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*].

5 *Reference Re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 at paras 52, 109, Lamer CJ [*Provincial Judges Reference*].

6 Ibid., at para. 19.

7 Canadian Charter of Rights and Freedoms, s. 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11.

8 Ibid.

9 Ibid., at para. 99.

10 Jamie Cameron, "The Written Word and the Constitution's Vital Unstated Assumptions," in *Essays in Honour of Gérald-A. Beaudoin: The Challenges of Constitutionalism*, ed. Pierre Thibault, Benoit Pelletier, and Louis Perret (Cowansville, QC: Éditions Y. Blais, 2002), 91.

11 Ibid., 113.

12 Ibid., 94.

13 Ibid., 95.

14 Ibid., 113.

15 Ian Binnie, "Charles Gonthier and the Unwritten Rules of the Constitution," presentation, *Responsibility, Fraternity and Sustainability in Law*, McGill University Faculty of Law, 20–21 May 2011, 6. Accessed 14 October 2017, http://cisdl.org/gonthier/public/pdfs/papers/Confrence_Charles_D_Gonthier_-_Ian_Binnie.pdf.

16 Ibid.

17 Walter Bagehot, *The English Constitution, 2nd ed.*, (London: Chapman and Hall, 1873), 183.

18 Binnie, "Charles Gonthier," 4, 9.

19 Ibid., 9.

20 Canadian Charter of Rights and Freedoms, s. 26, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11.

21 Canadian Bill of Rights, SC 1960, c 44, s. 5(1).

22 Peter Hogg, *Constitutional Law of Canada* (Scarborough, ON: Thomson Canada Limited, 2003), 781–91.

23 International Covenant on Civil and Political Rights, 19 December 1966, 99 UNTS 171 art 4 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

24 See International Commission of Jurists, "Executive Action and the Rule of Law: A Report on the Proceedings of the International Congress of Jurists, Rio de Janeiro, Brazil, Reprinting the Conclusions of the New Delhi Congress, the Conclusions of the Lagos Conference and the conclusions of the Rio Congress, along with the Proceedings of the Rio Congress," *International Commission of Jurists*, 1962, 8.

25 *A and Others v. Secretary of State for the Home Department*, 2005 UKHL 71, [2006] 45 ILM 503.

26 This was credited at the time to then-Justice Minister Pierre Elliott Trudeau as per Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton, AB: University of Alberta Press, 2013), 25.

27 Ibid., 267.

28 See Brian Peckford, "A Fresh Stab at the Night of the Long Knives," *Globe and Mail*, 11 November 2011, https://beta.theglobeandmail.com/news/politics/a-fresh-stab-at-the-night-of-the-long-knives/article4183635/?ref=http://www.theglobeandmail.com&.

29 Peter Niemczak and Phillip Rosen, *"Emergencies Act"* (Ottawa: Library of Parliament, 2001), available online at: http://publications.gc.ca/Collection-R/LoPBdP/BP/prb0114-e.htm

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31 *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12.

32 M.F.P. Solla, *Enforced Disappearances in International Human Rights* (Jefferson, NC: McFarland & Co., 2006), 7–31.

33 Strayer, *Constitutional Revolution*, 253.

34 Ibid.

35 Ibid.

36 ICCPR, art 4.

37 Ibid., art 4.2.

38 General Comment 29 of the UNHRC to the ICCPR, s 15: "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights."

39 Strayer, *Constitutional Revolution*, 252–3 (emphasis added).

40 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 29 [*Imperial Tobacco*].

41 Mark Carter, "The Rule of Law, Legal Rights in the *Charter*, and the Supreme Court's New Positivism," *Queen's Law Journal* 33 (2008): 464.

42 See e.g., Jeremy Waldron, "Is the Rule of Law an Essential Contested Concept (in Florida)," *Law and Philosophy* 21, no. 2 (2002): 137.

43 Carter, "Rule of Law," 465.

44 *Imperial Tobacco*, at para. 67.

45 Carter, "Rule of Law," 485.

46 *Galati v. Harper*, 2016 FCA 39, at para. 43.

47 *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

48 Ibid., at para. 135.

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2 *Edwards v. Attorney General of Canada*, [1930] AC 124, [1929] UKPC 86.

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5 *R. (Jackson) v. Attorney-General* [2005] UKHL 56, at para. 102.

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7 Ibid., 51.

8 Ibid.

9 Mark Walters, "Dicey on Writing *The Law of the Constitution*," *Oxford Journal of Legal Studies* 32, no. 1 (2012): 22.

10 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (New York: Oxford University Press, 2013), 31.

11 Ibid.

12 Ibid.

13 Ibid.

14 Dicey to Holmes, 10 December 1921, Oliver Wendell Holmes Jr Papers, HOLLIS 601674, Box 42–8, Harvard Law Library Special Collections. Quoted in Walters, "Dicey on Writing," 22.

15 Thomas Macaulay, *The History of England from the Accession of James the Second*, vol. 1 (London: Longman, Brown, Green and Longmans, 1848), 1.

16 Dicey, *Law of the Constitution*, 33.

17 See "National Socialist Racial Science: Color Palettes for Eye-Color Classification," German History Documents and Images, available online at http://germanhistorydocs.ghi-dc.org/sub_image.cfm?image_id=1949.

18 J.W.F. Allison, "History in the Law of the Constitution," *Journal of Legal History* 28, no.3 (December 2007): 269.

19 Ian Ward, *Writing the Victorian Constitution* (London: Palgrave, 2018), 188.

20 J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007).

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22 Henry de Bracton, *On the Laws and Customs of England*, trans. Samuel E. Thorne, ed. George E. Woodbine, vol. 2 (Cambridge, MA: Harvard University Press, 1977), 33.

23 William Blackstone, *Commentaries on the Laws of England, Book One* (Oxford: Clarendon Press, 1766), 72–3, accessed 2 July 2017, http://avalon.law.yale.edu/subject_menus/blackstone.asp.

24 See generally, Harold Berman, *Law and Revolution I: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1985).

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26 R.F.V. Heuston, *Essays in Constitutional Law*, 2nd ed. (London: Stevens & Sons, 1964), chapter 1.

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28 Phillip A. Joseph, "Constitutional Law," *New Zealand Law Review*, no. 1 (2006): 144.

29 *Thoburn v. Sunderland City Council*, GBR [2003] QB 151.

30 Ibid., at para 62.

31 *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, [2014] UKSC 3, at para. 207.

32 Ibid., at para. 203.

33 See Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom," *Queen's Law Journal* 41, no. 1 (2015).

34 *R. v. Lindsay*, 2003 BCSC 1203. As will be discussed in the next chapter, Lindsay should have been citing Magna Carta, 1297 since this is the statutory enactment that is, in certain respects, still the law of the land and the source of the unwritten constitutional principles that form part of the Canadian Constitution.

35 *R v. Rahey*, [1987] 1 SCR 588 at 636, 39 DLR (4th) 481.

36 The United Kingdom has the Human Rights Act, 1998, but this only allows the courts to issue a nonbinding declaration of invalidity. This quasi-constitutional instrument has also been under sustained political pressure over the last decade.

37 *R (Jackson) v. Attorney-General*, [2005] UKHL 56, [2006] 1 AC 262 [*Jackson*].

38 Bingham was the lone dissenter from the holding that section 2(1) was constitutionally embedded.

39 David Jenkins, "Common Law Declarations of Unconstitutionality," *International Journal of Constitutional Law* 7, no. 2 (2009): 207.

40 *Robinson v. Secretary of State for Northern Ireland 2002*, UKHL 32, at para. 11 [*Robinson*].

41 Ibid.

42 *See R v. Commissioner of Police of the Metropolis and Another, Ex p Bennett* [1995] QB 313.

43 *BH and another v. Lord Advocate and another*, [2012] UKSC 24, at para. 30.

44 See generally, Paul Romney, *Getting it Wrong* (Toronto: University of Toronto Press, 1999).

45 *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

46 *Robinson*, at para. 11.

47 *Northern Ireland Act 1998*, c 47, s 16.

48 *Robinson*, at para. 25.

49 That position is now held by Baroness Hale of Richmond, who has followed Bingham in contributing numerous exceptionally thought-provoking judgments on unwritten constitutional principles, most recently in *R. v. Secretary of State for Exiting the European Union* in which the majority noted that the "series of statutes enacted in the twenty years between 1688 and 1707 were of particular legal importance" and discussed both the English Bill of Rights, 1688 and the Case of the Proclamations (a central moment in Coke's struggle with James I) in detail.

50 Thomas Bingham, *The Rule of Law* (London: Allen Lane, 2010), quoting *The Mersey Docks and Harbour Board v. Gibbs* (1866) LR 1 HL 93, 110.

51 Blackburn said that it was established by the general rule of law that no one could be the judge of his own cause, which was the principle that Coke invoked when striking down a statute for being repugnant to the common law in *Dr. Bonham's Case*, [1610] 77 Eng. Rep. 638.

52 Bingham notes that many leading legal philosophers – including Joseph Raz – are "doubtful about whether the expression was meaningful at all." Ibid., 5.

53 The Constitutional Reform Act 2005, c 4, s 1(a).

54 Judith Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology*, ed. Allan C. Hutcheson and Patrick Monahan (Toronto: Carswell, 1987), 1.

55 Bingham, *Rule of Law*, 5.

56 Ibid., 9.

PART TWO

1 See generally, Herbert Butterfield, *The Whig Interpretation of History* (Kensington, NSW: University of New South Wales Library, 1981).

CHAPTER THREE

1 Howell A. Lloyd, "Constitutionalism," in *The Cambridge History of Political Thought, 1450–1700*, eds J.H. Burns and Mark Goldie (Cambridge: Cambridge University Press, 1994).
2 Thomas Bingham, *The Rule of Law* (London: Allen Lane, 2010), 11.
3 See generally, Ryan Patrick Alford, *Permanent State of Emergency* (Montreal: McGill-Queens University Press, 2017).
4 William Holdsworth, *A History of English Law*, vol. 1 (London: Methuen and Co, 1938), 59.
5 Ibid., 62.
6 *Oxford English Dictionary*, vol. 1 (Oxford: Oxford University Press, 1971), 63c.
7 The first edition of Halsbury's Laws of England noted that "The term 'common law' was imported into our laws from the canon law." *Halsbury's Laws of England*, vol. 11 (London: Butterworth and Co, 1910), 376 (viz. para. 713).
8 See generally, Ryan Patrick Alford, "How Do You Trim the Seamless Web?," *University of Cincinnati Law Review* 77, no. 3 (2008).
9 Paul Brand, "Henry II and the Creation of the English Common Law," in *Henry II: New Interpretations*, ed. Christopher Harper-Bill and Nicholas Vincent (Woodbridge, UK: Boydell Press, 2007), 232.
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12 Ralph Turner, *King John* (London: Longman Publishing Group, 1994), 174.
13 Innocent III, "Bull of August 24, 1215," as translated from Latin by David Starkey in *Magna Carta: The True Story Behind the Charter* (London: Hodder & Stoughton, 2015).
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16 Ibid., 141.
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24 Turner, *Magna Carta*, 154.

25 *Statutes of the Realm 1354*, c 3 28 Edw 3 ("None shall be condemned without due process of Law").

26 Ibid.

27 *Statutes of the Realm*, 1368, c 3 42 Edw 3.

28 Ibid.

29 Ibid.

30 Richard Huscroft, *Ruling England 1042–1217* (Harlow: Pearson PLC, 2005).

31 R.W. Carlyle and A.J. Carlyle, *A History of Medieval Political Theory in the West* (New York: Barnes and Noble, 1928), 457.

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34 Ibid., citing Stephen of Tournai to C.2 q.1 v. *an in manifestis*, printed in Linda Fowler-Magerl, *Ordo Iudicarium, Ordo Iudicarius*, 27–8 at note 76.

35 Ibid., 150.

36 Ryan Patrick Alford, "Rule of Law at the Crossroads," *Utah Law Review* 2011, no. 2 (2011): 1204.

37 Ibid., 1205–6, quoting J.G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970), 89.

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39 Cora Currier, "The Kill Chain: The Lethal Bureaucracy Behind Obama's Drone War," *The Intercept*, 15 October 2015.

40 See generally, Alford, *Permanent State of Emergency*.

CHAPTER FOUR

1 The conquest of Wales (and the Glyndwr Rising or Welsh Revolt that it sparked) proceeded largely without any spillover of hostilities into England. The Scottish Wars of Independence were also fought almost exclusively on Scottish soil. Later Scottish invasions, such as that which occurred prior to the Battle of Flodden, did not successfully venture very far south. England was not the battlefield in any of its Late Medieval wars and accordingly its citizens enjoyed the protection of its laws – which they forced its monarchs to recognize periodically in exchange for the funds that enabled the making of foreign wars.

2 The war is traditionally considered to have begun in 1455 at the Battle of St Albans. These were dynastic conflicts, fought by two branches of the House of Plantagenet for control of the throne of England: Henry V's only son Henry VI lost any hope of becoming King of France in 1453, losing all his holdings on the continent except the Pale of Calais. Henry had a better claim to the Crown of England on the theory of strict and male-preference primogeniture, but it had been unclear at the death of his great-grandfather Edward III whether the son of a crown prince's right to succeed was better than his uncles'. The issue was not settled by law – as there was no law regulating the order of succession in the United Kingdom on anything other than an *ad hoc* basis until the Act of Succession, 1701.

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6 Ibid., 83.

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11 See Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Palo Alto: Stanford University Press, 2003), 254–5.

12 J.P. Sommerville, *Politics and Ideology in England 1603–1640* (Harlow: Longman, 1986), 37.

13 Ibid., 152.

14 Harold Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale," *The Yale Law Journal* 103, no. 7 (1994), 1660.

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18 *Brownlowe v. Cox and Mitchell*, (1616), in Les Reportes de Henry Roll 188, 206, 288 (E.F. Roper et al. 1675); Moore KB 842 pl 1138, 3 Bulst. 32, 81 ER 27.

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24 John Hostettler, *Sir Edward Coke: A Force for Freedom* (New York: Barry Rose Law Publishers, 2003), 91.

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29 Sommerville, *Politics and Ideology*, 128.

30 Quoted in J.W. Gough, *Fundamental Law in English History* (Oxford: Clarendon Press, 1955), 72.

31 John Guy, "The Origins of the Petition of Right Reconsidered," *The Historical Journal* 25, no. 2 (1982): 298.

32 Sommerville, *Politics and Ideology*, 168–9.

33 D.L. Keir, "The Case of the Ship-Money," *Law Quarterly Review* 52 (1936): 546–8.

34 Ibid.

35 Sommerville, *Politics and Ideology*, 162.

36 Gough, *Fundamental Law*, 75.

37 Sommerville, *Politics and Ideology*, 162.

38 Petition of Right, 1628, c 1 3 Car 1, art. VIII (author's transliteration).

39 This act – one of the most important constitutional statutes – is known by various names. It is sometimes called the Habeas Corpus Act, 1640, although its provisions affecting the writ were largely superseded by the Habeas Corpus Act, 1679, so these will be discussed in the next chapter. Note that by early modern convention it is dated to the year the parliamentary session began and not to the year of its enactment, as modern practice would have it. This dating convention was preserved in this case by the Short Titles Act, 1896; this creates a contrast with the Bill of Rights, 1689, which in modern times is now dated to the year of its enactment.

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58 See J.A. Guy, "The Origins of the Petition of Right Reconsidered," *History Journal* 25, no. 2 (1982): 293–4.

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CHAPTER SIX

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Index

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